Supreme Court, U.S.
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No. ____

In The

Supreme Court of the United States

October Term, 1995

DR. BARBARA LEE PERLMUTTER, *et al.*,

Petitioners,

v.

MICHAEL COOPER, *et al.*,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does the "objective reasonableness" standard as set forth in *Graham v. Connor* 490 *U.S.* 386, 109 *S.Ct.* 1865, 104 *L.Ed.2d* 443 (1989) present an issue of fact to be determined by the jury, such that disposition of the issue on summary judgment is improper where plaintiff has presented evidence showing that plaintiff's decedent died as a result of excessive physical restraints?

2. Under applicable standards of Fed.R.Civ.P. 56, may civil rights claims under § 1983 alleging excessive force by police officers be dismissed on summary judgment without a careful review of plaintiff's expert testimony?

LIST OF PARTIES

DR. BARBARA LEE PERLMUTTER, General Administratrix and Administratrix ad Prosequendum of the Estate of Ann Perlmutter; and DR. BARBARA LEE PERLMUTTER, individually,

Plaintiffs,

MICHAEL COOPER, Individually and as a Police Officer of the Bloomfield Police Department; ROBERT HOCHSTUHL, Individually and as a Police Officer of the Bloomfield Police Department; PTL. PRIOLO, Individually and as a Police Officer of the Bloomfield Police Department; SGT. BEHRE, Individually and as a Police Officer of the Bloomfield Police Department; THE POLICE DEPARTMENT OF THE TOWNSHIP OF BLOOMFIELD; THE TOWNSHIP OF BLOOMFIELD; F. MENZEL, Individually and as Captain of the Bloomfield Volunteer Emergency Squad; A. DEPCZEK, Individually and as attendant of the Bloomfield Volunteer Emergency Squad; Ambulance Attendant DAVIS, Individually and as attendant of the Mountainside Hospital Mobile Intensive Care Unit (MICA aka Med VII); DAN MAC MAHON, Individually and as attendant of the Mountainside Hospital Mobile Intensive (MICA aka Med VII); and MOUNTAINSIDE HOSPITAL,

Defendants.

TABLE OF CONTENTS

Page

Questions Presented for Review i

List of Parties ii

Table of Contents iii

Table of Authorities iv

Opinions Below 1

Jurisdiction 1

Federal Statutes Involved 2

Statement of the Case 5

Procedural History 9

Legal Argument 10

Point I – Certiorari Should Issue so That This Court May Clarify the Ambiguities That Exist in Applying its Ruling in *Graham v. Connor* With Regard to Whether "Objective Reasonableness" is Ordinarily a Jury Question 10

A. The Decision Below is Sharply Contrasted by Decisions in Other Circuits, Which Hold That "Reasonableness" is an Issue of Fact, not One of Law 13

Point II – Certiorari Should Issue so That This Court Can Settle the Apparent Conflict Among the Circuits Regarding the Necessity for a Court to Carefully Review Expert Testimony in § 1983 Matters Involving Police Misconduct 19

Conclusion 22

TABLE OF AUTHORITIES

Page

CASES

Anderson v. Liberty Lobby, Inc., 477 *U.S.* 242, 106 *S.Ct.* 2505, 91 *L.Ed.2d* 202 (1986) 17

Brisk v. City of Miami, 726 *F.Supp.* 1305 (S.D.Fla. 1989) 16

Bruner v. Dunaway, 684 *F.2d* 422 (6th Cir. 1982), *cert. den.*, 459 *U.S.* 1171, 103 *S.Ct.* 816, 74 *L.Ed.2d* 1014 (1983) 18

Byrd v. Clark, 783 *F.2d* 1002 (11th Cir. 1986) 17

Calamia v. City of New York, 879 *F.2d* 1025 (2d Cir. 1989) 14

Chew v. Gates, 27 *F.3d* 1432, 1443 (9th Cir. 1994) 13

Fitzgerald v. McDaniel, 833 *F.2d* 1516 (11th Cir. 1987) 15

Gagnon v. Ball, 696 *F.2d* 17 (2d Cir. 1982) 17

Graham v. Connor, 490 *U.S.* 386, 109 *S.Ct.* 1865, 104 *L.Ed.2d* 443 (1989) ..... *passim*

Hammer v. Gross, 932 *F.2d* 842 (9th Cir. 1991) 13

Janicsko v. Pellman, 774 *F.Supp.* 331, 342 (M.D.Pa. 1991), *aff'd*, 970 *F.2d* 899 (3d Cir. 1992) 15

Kopf v. Skyrm, 993 *F.2d* 374 (4th Cir. 1993) 20

McDowell v. Rogers, 863 *F.2d* 1302 (6th Cir. 1988) 15

Melear v. Spears, 862 *F.2d* 1177 (5th Cir. 1989) 15

Powell v. Gardner, 891 *F.2d* 1039 (2d Cir. 1989) 14

Quezada v. County of Vernalillo, 944 *F.2d* 710 (10th Cir. 1991) 15

TABLE OF AUTHORITIES – Continued

Page

Russo v. City of Cincinnati, 953 *F.2d* 1036 (6th Cir. 1992) 19

Technitrol, Inc. v. Control Data Corp., 550 *F.2d* 992 (4th Cir. 1977), *cert. denied*, 434 *U.S.* 822, 98 *S.Ct.* 65, 54 *L.Ed.2d* 79 (1977) 19

Vizbaras v. Prieber, 761 *F.2d* 1013 (4th Cir. 1985) 8

Webb v. Hiykel, 713 *F.2d* 405 (8th Cir. 1983), *modified on other grounds*, 740 *F.2d* 500 (1984) 17

Wilson v. Meeks, 52 *F.3d* 1547 (10th Cir. 1995) 8

Yang v. Hardin, 37 *F.3d* 282 (7th Cir. 1994) 17

STATUTES AND RULES

Fed.R.Civ.P 56 2

28 U.S.C. § 1254(1) 1

42 U.S.C. § 1983 ..... 2, 9, 19, 21

OTHER AUTHORITIES

O'Connell, *Excessive Force Claims: Is Significant Bodily Injury the Sine Qua Non to Proving a Fourth Amendment Violation?* 739 (1990) 58 **Fordham L. Rev.** 739 (1990) 16

$800,000 Wrongful Death Settlement, New Jersey Law Journal, Jan. 23, 1995, p.31 8

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PETITION FOR WRIT OF CERTIORARI

Petitioners, DR. BARBARA LEE PERLMUTTER, General Administratrix ad Prosequendum of the Estate of Ann Perlmutter; and DR. BARBARA LEE PERLMUTTER, Individually, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit entered on May 26, 1995.

OPINIONS BELOW

The Judgment Order of the Court of Appeals for the Third Circuit, for which review is sought, dated May 26, 1995, is reproduced in the Appendix, as is the order of the Court of Appeals denying a rehearing, dated July 12, 1995. The three decisions of the United States District Court for the District of New Jersey granting summary judgment (one of them dated November 18, 1993 and two of them dated June 7, 1994) are also reproduced in the Appendix. Also contained within the Appendix is a copy of the decision by the District Court denying reconsideration, dated August 23, 1994.

JURISDICTION

Judgment was entered by the Court of Appeals for the Third Circuit on May 26, 1995. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

FEDERAL STATUTES INVOLVED

The relevant federal statutory and rule provisions are as follows:

42 U.S.C. § 1983 – Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the other party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Fed.R.Civ.P 56 –

(a) For claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as

would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any

offending party or attorney may be adjudged guilty of contempt.

STATEMENT OF THE CASE

As described below, this case involves the untimely and unnecessary death of a 23 year old woman, which could have only occurred as a result of suffocation caused by the excessive restraints placed upon her by respondents – "brutal" restraints, in the words of petitioners' medical expert. In a series of rulings below, summary judgment was granted in favor of all defendants, including the police defendants, who were dismissed upon a finding by the District Court that the "force" applied was reasonable under the circumstances.

On May 20, 1989, at approximately 1:00 a.m., the Bloomfield, New Jersey Police Department received a telephone call reporting a woman lying on the front lawn of an apartment building. A second call received a few minutes later advised that a woman had fallen through a plate-glass window of a basement apartment in that same building.

The woman who was the subject of the telephone calls was Petitioner's decedent, Ann Perlmutter ("Ann"). Ann was a petite woman, about five feet, three inches tall and slender, and was small enough to resemble a child. Ms. Sinauskas, the resident of the apartment into which Ann had fallen (or had been thrown), testified that, prior to the police officers' arrival, Ann had appeared confused, disoriented and seemed to wander around aimlessly. Ann was covered – hair, face, arms, and legs –

with her own blood, and left bloody handprints on the walls as she steadied herself while walking down the hall. Although Ann did not speak, Ms. Sinauskas understood by her gestures that she wanted to leave, and had gone to open the front door as the police arrived.

As the police officers entered the apartment, Ann, still dazed and apparently frightened, retreated to the rear of the apartment, and the police officers followed her into a bedroom.

Four police officers were present, followed only a few minutes later by two emergency squad members. Shortly thereafter, an additional two mobile intensive care unit members arrived. Thus the total number of police and rescuers present was eight. As mentioned, Ann was a petite woman who had obviously undergone recent trauma of some sort and appeared disoriented; she had no weapons and obviously lacked the ability to overpower the large group of persons on the scene.

The police officers testified that their initial efforts to talk to her to calm her down were unsuccessful, so they applied physical restraints "for her own safety". It is undisputed that the officers handcuffed Ann's arms behind her back, and then tied her legs together with a bedsheet, supposedly to prevent her from harming herself. The officers then took this obviously injured woman, laid her on her stomach on a "reeves stretcher", tightly fastened to her with three straps across her body, and then placed her and the stretcher on a wheeled cot, where additional straps were placed across her chest.

Ann was not arrested or charged with any offense; respondents have conceded Ann to have been a victim

rather than a suspect of any criminal activity. Yet, she remained brutally restrained for several minutes. When, as Ann was wheeled into the ambulance, the emergency workers finally discovered that she was in cardiac arrest, she was resuscitated; however, she died six days later as a result of massive brain damage, having never regained consciousness.

The amount of time that Ann was unconscious and in cardiac arrest was a hotly contested issue. Respondents' testimony was that she was resuscitated almost immediately after she "went quiet". However, petitioners' medical expert, Dr. Derby, states that the massive brain damage that Ann suffered must have been caused from a period of asphyxiation lasting no fewer than seven minutes, and possibly over ten minutes. The minor bruise that the autopsy revealed was not capable of causing the massive destruction of brain tissue, and the blood tests performed upon her when she arrived at the hospital did not reveal any drugs or intoxicants that could have caused such damage. Simply stated, Ann's body was compelling evidence that she had been suffocated and allowed to suffer irreversible and fatal brain damage as a result of the respondents' conduct.

Petitioners' medical expert, Dr. Derby, has said that the combination of straps across Ann's body, together with the blanket that was also placed along her, severely restricted Ann's ability to expand her chest, and thus prevented her from breathing. This condition was further aggravated by the continued binding of Ann's hands and legs behind her back, placing her in a position which by

itself interfered with her ability to expand her chest, and in fact constituted a *per se* risk to life.[1]

As Dr. Derby further stated in his report, respondents failed to follow any of the elementary safety guidelines to which one must adhere following such a relentless impediment of a person's respiration for several minutes. For example, there was no observation of Ann's face; nor did respondents monitor the pulse every 30 seconds (as they should have); nor did they check if the patient was constantly breathing. In order to be able to see if breathing is occurring, which is crucial, the technician has to stay right next to, attempt to talk to, and look in the face of, the victim on the stretcher at all times.

Furthermore, as petitioners' police expert, Mr. diGrazia, has stated, the officers' decision to place Ann on a reeves stretcher after she had already been "hog-tied" to such an extent was far beyond any reasonable use of force that could ever have been appropriate, considering her size and ominously imperiled medical condition.

The District Court (and apparently, the Court of Appeals as well) overlooked the evidence presented by

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[1] Such "positional asphyxiation" has been reported in several circumstances where persons in police custody died as a result of the application of physical restraints. *See, Wilson v. Meeks*, 52 *F.3d* 1547, 1550 (10th Cir. 1995), *Vizbaras v. Prieber*, 761 *F.2d* 1013, 1015 (4th Cir. 1985), *$800,000 Wrongful Death Settlement*, New Jersey Law Journal, Jan. 23, 1995, p.31, *Dead Man's Family Files Federal Suit Alleging Brutality by County Police*, Baltimore Sun, Jan. 1, 1995, p. 5C., *Daughter's Jail-Cell Death Prompts Suit*, News & Record (Greensboro, N.C.), July 22, 1994, p. B1.

petitioners, and did not address any of the material in the record demonstrating the unreasonableness of the restraints applied to Ann. Thus, the record clearly demonstrated, at a minimum, the existence of a triable jury issue.

PROCEDURAL HISTORY

On May 16, 1991, petitioners filed a Complaint in the United States District Court for the District of New Jersey. The complaint alleged that the police officers, as well as ambulance and medical personnel had wrongfully deprived Ann of her civil rights (by taking her life) and demanded relief under, *inter alia*, 42 U.S.C. § 1983.

After two years of discovery, the District Court (John W. Bissell, U.S.D.J.) granted summary judgment in favor of certain defendants (associated with the Bloomfield Volunteer Emergency Squad). The opinion and accompanying order were signed on November 18, 1993.

After several other defendants moved for summary judgment, the District Court issued two companion opinions on June 7, 1994. In the first opinion, summary judgment was granted to the defendant police officers. In the other opinion, summary judgment was granted to the remaining defendants (associated with the Mobile Intensive Care Unit).

On August 23, 1994, the District Judge summarily rejected petitioners' motion to reconsider, despite the considerable expert testimony and other evidence that was submitted by petitioners' substituted counsel.

On September 20, 1994, petitioners filed a notice of appeal to the United States Court of Appeals to the Third Circuit. The matter was extensively briefed by all parties. Indeed, recognizing the importance of this case, the Court of Appeals requested additional legal argument by the parties regarding two recent decisions from that Circuit. The supplemental material was supplied. On May 26, 1995, the Court of Appeals affirmed the District Court's earlier opinions via a single page judgment order which simply adopted the reasoning expressed by the District Court.

On July 12, 1995, the Third Circuit denied petitioners' motion for rehearing, and the instant petition resulted.

LEGAL ARGUMENT

POINT I

CERTIORARI SHOULD ISSUE SO THAT THIS COURT MAY CLARIFY THE AMBIGUITIES THAT EXIST IN APPLYING ITS RULING IN *GRAHAM v. CONNOR* WITH REGARD TO WHETHER "OBJECTIVE REASONABLENESS" IS ORDINARILY A JURY QUESTION.

The District Court, in determining by motion that the force used by respondent police officers was not excessive as a matter of law, misapplied the standard of "objective reasonableness" announced by this Court in *Graham v. Connor*, 490 *U.S.* 386, 109 *S.Ct.* 1865, 104 *L.Ed.2d* 443 (1989).

The facts in *Graham* are similar, yet significantly less compelling than those of the present case. A police officer

observed Graham acting erratically, having rapidly entered and exited a store before entering a friend's car. The officer stopped the car, and was advised at that time by the driver that Graham was a diabetic and was experiencing "sugar shock". Graham subsequently exited the car and briefly lost consciousness. 490 *U.S.* at 389, 109 *S.Ct.* at 1868.

Several police officers responded to the scene, and, believing that Graham was drunk, handcuffed his hands behind his back, carried him to the police car and threw him in head-first. Upon learning that Graham had done nothing wrong at the store, the officers then drove him home and released him. Graham suffered a broken foot, cuts on the wrists, a bruised forehead, and a persistent ringing in the ear as a result of his treatment at the hands of the police. 490 *U.S.* at 390, 109 *S.Ct.* at 1868.

Graham brought suit, claiming that police officers used "excessive force" in detaining him. The District Court granted a directed verdict in favor of the defendants, ruling (1) that Graham suffered no discernable injury, and that (2) the police officers acted without malice. A divided Circuit Court affirmed. *Id.*

This Court reversed. The Court ruled that "excessive force" cases arising out of an "arrest, investigatory stop, or other 'seizure' of a free citizen" should be analyzed under the objective reasonableness standard of the Fourth Amendment. 490 *U.S.* at 395, 109 *S.Ct.* at 1871. Under this standard, the intent of the police officer is irrelevant; there is no need, therefore, to show that the officer acted with malice or the specific intent to inflict pain. The standard, which requires the court to balance the nature

and quality of the intrusion upon the individual's Fourth Amendment interests against the countervailing governmental interests at stake, requires "**careful attention to the facts and circumstances of each particular case**, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or is attempting to evade arrest by flight." 490 *U.S.* at 396, 109 *S.Ct.* at 1871-1872. (emphasis added). This Court remanded the case for reconsideration under the proper Fourth Amendment standard.

Graham applies *a fortiori* to the facts of this case. Like in *Graham*, Ann Perlmutter had not, in fact, committed a crime and was nevertheless made a victim of excessive force by police officers. But more seriously, Ann was restrained far more severely than Graham had been – to the point where she could no longer breathe. And unlike in *Graham*, the victim is no longer here to sue on her own behalf, due to the fatal injuries that she sustained in the cruel assault upon her by respondents.

Interestingly, in *Graham*, the plaintiff received relatively minor injuries, but Ann lost her life even though there is nothing to suggest that she posed a danger to the officers or anyone else. In this regard, the respondents' claim that they restrained Ann to "protect" her from injuring herself could never have justified an entry of summary judgment, especially where petitioners' experts have opined that Ann's death can only be explained by the tightening restraints to such a degree that she could not breathe. This case is far removed from that of the fleeing felon with a gun as to which the use of deadly force may be permitted; yet such deadly force was indeed

used here where respondents bound Ann so tightly that she was simply unable to breathe.

A. The Decision Below is Sharply Contrasted by Decisions in Other Circuits, Which Hold that "Reasonableness" is an Issue of Fact, not One of Law.

The District Court's decision, as affirmed by the Third Circuit, is in direct conflict with the decisions from other circuits. As set forth below, numerous circuits have held that the issue of "objective reasonableness" must be decided by the finder of fact. It is respectfully submitted that those decisions represent the proper interpretation of this Court's holding in *Graham*, and the Third Circuit's approach represents a dangerous departure thereof, necessitating review by this Court.

The Ninth Circuit stated in *Hammer v. Gross*, 932 *F.2d* 842, 846 (9th Cir. 1991), "in light of all these considerations, and of the fact that 'the integrity of an individual's person is a cherished value of our society', we conclude that the question of the reasonableness of force applied by the defendants in the circumstances of this case was properly one for the jury." (quoting *Schmerber v. California*, 384 *U.S.* 757, 86 *S.Ct.* 1826, 16 *L.Ed.2d* 908 (1966)). The Ninth Circuit's view was reiterated in *Chew v. Gates*, 27 *F.3d* 1432, 1443 (9th Cir. 1994), "because questions of reasonableness are not well-suited to precise legal determination, the propriety of a particular use of force is generally an issue for the jury."

In determining that a jury trial was necessary to determine the question of reasonableness, the *Chew* court

ruled that the first prong of the *Graham* test – the severity of force applied – strongly outweighed the risk of harm to the police or others as well as the possibility of flight by the victim. "[Applying *Graham*] would not have required a rational jury to decide that using [a police dog] to apprehend him was reasonable." *Chew* at 1441. "Moreover, the district court's decision to take the excessive force question away from the jury conflicts with circuit law". *Id.*

In *Calamia v. City of New York*, 879 *F.2d* 1025 (2d Cir. 1989), the Second Circuit applied *Graham* to a case in which the suspected burglar was arrested by being shoved in the chest, thrown onto the floor, turned over and handcuffed extremely tightly behind his back for five or six hours. *Id.* at 1029. In applying the "objective reasonableness" standard, the Court said "**it was for the jury to determine** whether Sutton's conduct in connection with the arrest, pushing Calamia to the floor and causing him to remain there in a painful posture without circulation in his hand for many hours while the officers collected the property was, as an objective matter reasonable." *Id.* at 1035. (Emphasis added). Thus, the Second Circuit agrees with the Ninth Circuit's view that "objective reasonableness" is a jury question.[2]

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[2] In the context of a directed verdict motion, the Second Circuit was emphatic that the question of the reasonableness of a police officer's use of force belonged with the jury, and, applying the *Graham* test, ruled that the district court had erred in directing a verdict against the plaintiff. *Powell v. Gardner*, 891 *F.2d* 1039, 1044 (2d Cir. 1989) ("[The trial court, by directing a verdict in favor of police officers] improperly ruled on the basis of its own assessment of the weight of the evidence, rather than

Similarly, the Tenth Circuit ruled in *Quezada v. County of Vernalillo*, 944 *F.2d* 710, 715 (10th Cir. 1991) that "whether the police used excessive force in a § 1983 case has always been seen as a factual inquiry best answered by the fact finder." The Eleventh Circuit, in a pre-*Graham* decision, has similarly ruled. *Fitzgerald v. McDaniel*, 833 *F.2d* 1516, 1518-19 (11th Cir. 1987) ("whether [defendant's] use of deadly force under these circumstances was reasonable was a question for the jury"). *See also, Melear v. Spears*, 862 *F.2d* 1177, 1184 n.7 (5th Cir. 1989) ("As the trier of fact, the jury could properly determine the reasonableness of [the police officer's] actions after being instructed according to the [applicable standard]").

In sum, several circuits have held that the *Graham* decision militates strongly in favor of a jury determination of the reasonableness of the force used by police officers. Thus the Third Circuit's affirmance of a judge's summary findings in this regard demonstrated a significant distancing from that reasoned policy. The Third Circuit holds that it is the province of the trial court to decide, on a motion for summary judgment, whether the force exhibited by police was "objectively reasonable".[3]

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viewing the evidence in the light most favorable to Powell"). *See also, McDowell v. Rogers*, 863 *F.2d* 1302, 1307 (6th Cir. 1988) ("a trial court is not entitled to weigh the evidence, evaluate the credibility of witnesses, or substitute its judgment for that of the jury.").

[3] Apparently, the courts below rejected a Third Circuit decision involving a similar factual setting where a plaintiff was subjected to physical force by police for unusual (but not criminal) behavior. In *Janicsko v. Pellman*, 774 *F.Supp.* 331, 342 (M.D.Pa. 1991), *aff'd*, 970 *F.2d* 899 (3d Cir. 1992), the district

Besides the obvious conflict with other circuits that this poses, the Third Circuit has ruled contrary to the literal meaning and spirit of *Graham*, which, we respectfully submit, was never intended to be applied in this manner. *See*, O'Connell, *Excessive Force Claims: Is Significant Bodily Injury the Sine Qua Non to Proving a Fourth Amendment Violation?*, 58 **Fordham L. Rev.** 739, 740 n.10 (1990) ("Although Graham did not explicitly state whether the question of 'objective reasonableness' was for the judge or jury, this inquiry is presumably for the jury.").

The instant case was certainly a matter for the jury, considering (i) the force applied – excessively strapping Ann to the stretcher to the point where she suffocated – (ii) Ann's actions, although unusual, presented no real risk of injury to the police and other persons present, (iii) there was nothing demonstrating an attempt to flee.

While petitioners' certainly acknowledge that in any given factual setting, there may not be a "hard and fast" rule governing the extent of reasonable uses of force, it is respectfully submitted that under these facts, a careful review of the entire record would support a finding of an "unreasonable" use of force. The instant facts are similar to those in *Brisk v. City of Miami*, 726 *F.Supp.* 1305 (S.D.Fla. 1989). There, plaintiff was pulled over by police officers who handed him a citation (without cause, according to plaintiff) and following an argument, was beaten and "hog-tied" by police officers. Plaintiff turned blue and

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court, facing differing versions of the alleged incident, ruled that the issue of "whether that force was excessive, is an issue for the finder of fact" thereby precluding summary judgment on the issue.

stopped breathing. On a motion to dismiss on qualified immunity grounds, the court ruled that the issue should be decided by a jury, because, the issue of whether qualified immunity applied depended upon the reasonableness of the use of force, which was the jury's role. *Id.* at 1313.

Naturally, in the instant case, where the District Court had based the finding of "undisputed facts" solely on the police testimony and where the victim is no longer able to testify on her own behalf due to her death, there is even more reason for a court to resist its temptation to "clean its docket" by summarily dismissing a case. Rather, the prevailing – and correct – view, yields to the jury for decision on these issues. Summary judgment should only be tolerated when there is truly an absence of triable issues of material fact, after honestly drawing all inferences in favor of the non-moving party pursuant to the standard of Rule 56. *Anderson v. Liberty Lobby, Inc.*, 477 *U.S.* 242, 255, 106 *S.Ct.* 2505, 2513, 91 *L.Ed.2d* 202 (1986).

Moreover, even assuming, *arguendo*, that some of the respondents (police or ambulance personnel) were not personally involved in the unlawful assault upon Ann, the law in most circuits has been to impose § 1983 liability for "standing by" while other officers "summarily punish" a third person within his or her presence or knowledge. *Yang v. Hardin*, 37 *F.3d* 282, 285 (7th Cir. 1994). *See also, Gagnon v. Ball*, 696 *F.2d* 17, 21 (2d Cir. 1982) (officer liable for failing to prevent false arrest), *Byrd v. Clark*, 783 *F.2d* 1002, 1007 (11th Cir. 1986) (court must inquire into whether police officer had opportunity to intervene during another officer's beating of plaintiff), *Webb v. Hiykel*, 713 *F.2d* 405, 408 (8th Cir. 1983), *modified on*

other grounds, 740 *F.2d* 500 (1984) (imposing liability upon officer for failing to intervene, even though officers using excessive force were his superiors), *Bruner v. Dunaway*, 684 *F.2d* 422, 426 (6th Cir. 1982), *cert. den.*, 459 *U.S.* 1171, 103 *S.Ct.* 816, 74 *L.Ed.2d* 1014 (1983) ("acts of omission are actionable in [§ 1983 cases involving the excessive use of force] to the same extent as are acts of commission.").

It should also be noted that the terse, judge-issued dismissal typified the harsh treatment that has been afforded petitioners' attempts to bring justice to this matter. Examples of this treatment included: (a) no legitimate explanation from the pertinent authorities following the tragedy; (b) no more than summary dismissal of all claims given by the federal tribunal, including on reconsideration, without any reasoned consideration of the most significant evidence (certainly none expressed in any opinion), thus depriving the aggrieved family of its "day in court"; and (c) the absence of a reasoned decision on appeal. This at least gives rise to the perception of injustice.

Consequently, it is respectfully submitted that this Court grant a Writ of Certiorari to both settle this conflict and to clarify the application of its prior decision of *Graham v. Connor*.

POINT II

CERTIORARI SHOULD ISSUE SO THAT THIS COURT CAN SETTLE THE APPARENT CONFLICT AMONG THE CIRCUITS REGARDING THE NECESSITY FOR A COURT TO CAREFULLY REVIEW EXPERT TESTIMONY IN § 1983 MATTERS INVOLVING POLICE MISCONDUCT.

The District Court was required to review all of the affidavits, exhibits and other evidence presented by the parties when deciding the motion for summary judgment. In its opinions, the court did not even recognize the existence of petitioners' expert witnesses and their affidavits, let alone review their contents. Yet, the experts illustrated that the conduct engaged in by the respondent police officers was, in fact, unreasonable under the circumstances. This is especially wrong, given the nature of this case.

Contrasting the Third Circuit's ruling on this issue, the Sixth Circuit has forcefully ruled otherwise. "To disregard expert testimony in [§ 1983] cases would, we believe, carry with it the danger of effectively insulating a municipality from liability for injuries resulting directly from its indifference to the rights of its citizens." *Russo v. City of Cincinnati*, 953 *F.2d* 1036, 1047 (6th Cir. 1992).

The Fourth Circuit has also emphasized the importance of carefully reviewing **both sides'** experts on a motion for summary judgment. "[W]here there is conflicting evidence before the court, . . . disposing of the issue on motion [by adopting the evidence of one party and disregarding the expert testimony of the other] on motion for summary judgment, is not proper." *Technitrol, Inc. v.*

Control Data Corp., 550 *F.2d* 992, 997 (4th Cir. 1977), *cert. denied*, 434 *U.S.* 822, 98 *S.Ct.* 65, 54 *L.Ed.2d* 79 (1977).

The value of expert testimony in excessive force cases was particularly discussed by the Fourth Circuit in *Kopf v. Skyrm*, 993 *F.2d* 374 (4th Cir. 1993), wherein the court ruled that the exclusion of the plaintiff's expert on police procedures (coincidentally, Robert diGrazia, petitioners' expert herein) was an abuse of discretion requiring reversal. The *Kopf* Court explained:

> As a general proposition, the "objective reasonableness" standard may be comprehensible to a lay juror. On the other hand, any "objective" test implies the existence of a standard of conduct, and, where the standard is not defined by the generic – a reasonable person – but rather by the specific – a reasonable officer – it is more likely that Rule 702's line between common and specialized knowledge has been crossed.
>
> The district court seems to have deduced a blanket rule that expert testimony is generally inappropriate in excessive force cases . . . To the contrary, expert testimony has often been admitted in such cases. [citations omitted]. Nonetheless, a blanket rule that expert testimony is generally admissible in excessive force cases would be just as wrong as a blanket rule that it is not.
>
> The facts of every case will determine whether expert testimony would assist the jury. Where force is reduced to its most primitive form – the bare hands – expert testimony might not be helpful. Add handcuffs, a gun, a slapjack, mace, or some other tool, and the jury may start

> to ask itself: what is mace? what is an officer's training on using a gun? how much damage can a slapjack do? Answering these questions may often be assisted by expert testimony.

993 *F.2d* at 378. diGrazia's testimony in the instant matter clearly would have been of great assistance to the finder of fact in light of the lay person's general unfamiliarity with the methods for dealing with disoriented, noncommunicative persons with undefined medical problems, or the use of specific types and levels of restraints in defined circumstances.

A review of the District Court's opinions – affirmed by the Court of Appeals – reveals a complete disregard for these precepts. The District Court adopted the factual contentions of the defendants (*i.e.*, the **moving parties**), without even commenting on the substantial evidential submissions presented by the plaintiffs. No mention was made of the expert testimony proffered by the plaintiffs which clearly set forth a prima facie case of excessive force; shockingly, in the opinion denying plaintiffs' motion for reconsideration, the court recognized that plaintiffs were urging it to consider the reports but failed to even mention the experts' proffered testimony thereafter.

The Third Circuit's acquiescence of the trial court's refusal to consider petitioners' expert reports runs against the opinions of the Courts of Appeals for several circuits. Thus, it is respectfully urged that this Court speak on the subject to clarify the law on expert testimony in § 1983 cases.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court grant a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

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West Orange, New Jersey 07052

Attorneys for Petitioners

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 94-5579

DR. BARBARA LEE PERLMUTTER, General Administratrix and Administratrix ad Prosequendum of the Estate of Ann Perlmutter, and DR. BARBARA LEE PERLMUTTER, Individually,

Appellant

v.

MICHAEL COOPER, Individually and as Police Officer of the Bloomfield Police Department; ROBERT HOCHSTUHL, Individually and as a Police Officer of the Bloomfield Police Department; PTL. PRIOLO, Individually and as a Police Officer of the Bloomfield Police Department; JOHN DOE, Individually and as a Police Officer of the Bloomfield Police Department; SGT. BEHRE, Individually and as a Police Officer of the Bloomfield Police Department; JOHN MCNIFF, Individually and as Chief of Police of the Bloomfield Police Department; THE POLICE DEPARTMENT OF THE TOWNSHIP OF BLOOMFIELD; THE TOWNSHIP OF BLOOMFIELD; F. MENZEL, Individually and as Captain of the Bloomfield Volunteer Emergency Squad; A. DEPCZEK, Individually and as attendant of the Bloomfield Volunteer Emergency Squad; JOHN DOE II, Individually and as attendant of the Bloomfield Volunteer Emergency Squad; BLOOMFIELD VOLUNTEER EMERGENCY SQUAD; AMBULANCE ATTENDANT DAVIS, Individually and as attendant of the Mountainside Hospital Mobil Intensive Care Unit (MICU aka Med VII): DAN MACMAHON, Individually and as attendant of the Mountainside Hospital Mobile Intensive Care Unit (MICU aka MED

VII); JOHN DOE III, Individually and as attendant of the Mountainside Hospital Mobile Intensive Care Unit (MICU aka Med VII); MOUNTAINSIDE HOSPITAL
(Caption amended per the Clerk's 10-21-94 order)

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil No. 91-cv-02140)
District Judge: Hon. John W. Bissell

Submitted Pursuant to Third Circuit LAR 34.1(a)
May 23, 1995

Before: COWEN, ROTH and ALDISERT, *Circuit Judges*

JUDGMENT ORDER

After considering the contentions raised by appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court entered August 25, 1994, be and is hereby affirmed substantially for the reasons set forth by Judge Bissell in his opinion dated August 23, 1994. Costs taxed against appellant.

ATTEST:

/s/ P. Douglas Sisk,
Clerk
Dated: May 26, 1995

By the Court,

/s/ Robert E. Cowen
CIRCUIT JUDGE

Costs taxed in favor of Appellees, Michael Cooper, Robert Hochstuhl, Priolo and Behre as follows:

Appendix	$437.60
Brief	$ 99.00
TOTAL COSTS	$536.60

Certified as a true copy and issued in lieu of a formal mandate on July 20, 1995.

Teste: /s/ P. Douglas Sisk

Clerk, U. S. Court of Appeals for the Third Circuit.

NOT FOR PUBLICATION

UNITED STATES
DISTRICT COURT
DISTRICT OF NEW JERSEY

DR. BARBARA LEE PERLMUTTER, General Administratrix and Administratrix ad Prosequendum of the Estate of Ann Perlmutter; and DR. BARBARA LEE PERLMUTTER, Individually,

Plaintiff,

v.

MICHAEL COOPER, Individually and as Police Officer of the Bloomfield Police Department; ROBERT HOCHSTUHL, Individually and as a Police Officer of the Bloomfield Police Department; PTL. PRIOLO, Individually and as a Police Officer of the Bloomfield Police Department; JOHN DOE, Individually and as a Police Officer of the Bloomfield Police Department; SGT. BEHRE, Individually and as a Police Officer of the Bloomfield Police Department; JOHN MC NIFF, Individually and as Chief of Police of the Bloomfield Police Department; THE POLICE DEPARTMENT OF

Civil Action No. 91-2140

OPINION

THE TOWNSHIP OF BLOOMFIELD; THE TOWNSHIP OF BLOOMFIELD; F. MENZEL, Individually and as Captain of the Bloomfield Volunteer Emergency Squad; A. DEPCZEK, Individually and as Attendant of the Bloomfield Volunteer Emergency Squad; JOHN DOE II, Individually and as Attendant of the Bloomfield Volunteer Emergency Squad; AMBULANCE ATTENDANT DAVIS, Individually and as Attendant of the Mountainside Hospital Mobil Intensive Care Unit, (MICU aka Med VII); DAN MAC MAHON, Individually and as Attendant of the Mountainside Hospital Mobile Intensive Care Unit (MICU aka Med VII); JOHN DOE III, Individually and as Attendant of the Mountainside Hospital Mobile Intensive Care Unit (MICU aka Med VII); and MOUNTAINSIDE HOSPITAL,

Defendants.

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BISSELL, *District Judge*

The action, filed on May 16, 1991, involves purported claims under 42 U.S.C. §§ 1983 and 1985, accompanied by state law tort claims. The death of Ann Perlmutter, the administratrix's daughter ("plaintiff"), subsequent to her

contacts with the Bloomfield Police, the Bloomfield Volunteer Emergency Squad ("BVES"), and the Mountainside Hospital Mobile Intensive Care Unit ("Mountainside Unit"), prompted the bringing of this suit. Defendants BVES and its members Frederick Menzel and Andrew Depczek have moved for summary judgment. They will sometimes be referred to hereafter collectively as "the BVES defendants." The Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1331.

FACTS

Ann Perlmutter died on May 26, 1989 as a result of an incident that occurred on May 20, 1989. (Noto Cert., ¶ 2). BVES, Frederick Menzel and Andrew Depczek became involved in the May 20th matter when BVES received a "dispatch" claiming a woman was "down" on the lawn in front of 165 Franklin Street, Bloomfield. (Defendants' Br. at 1). 165 Franklin Street was the residence of Ann Perlmutter. (Noto Cert., ¶ 1).

Carrying out their duties as members of BVES, Menzel and Depczek arrived on the scene and were directed to a basement apartment of the building. (Defendants' Br. at 1; Noto Cert., ¶ 4). They were told a woman had allegedly crashed through the resident's window. (*Id.*) The defendants observed four policemen holding down Ms. Perlmutter as they entered the apartment. (Moore Cert., Exh. A; Plaintiff's Br., Exh. B at 30).

As Menzel and Depczek began treatment of Ms. Perlmutter, she began thrashing her arms and kicking her legs. (Noto Cert., ¶ 5). The police officers then handcuffed Ms. Perlmutter's arms behind her back and tied

her legs together with a bed sheet. (*Id.*, ¶ 5). Ms. Perlmutter placed "face down" on a stretcher by the police, was strapped to it by the defendants. (Plaintiff's Br., Exh. B at 49-51).[1]

After carrying her out of the apartment, Menzel and Depczek strapped Ms. Perlmutter to a rolling cot, "face down" again. (Noto Cert., ¶¶ 9-11). The two Squad members noticed Ms. Perlmutter had become "totally quiet" and observed she had stopped breathing when they arrived at the ambulance. (*Id.*, ¶ 12). They immediately removed the handcuffs and restraining straps. (Plaintiff's Br., Exh. B at 57-58).

The Mountainside paramedics and the BVES members then turned Ms. Perlmutter over and began medical treatment to try to revive her. (*Id.*)[2] Upon arrival at the hospital, the medical treatment in the ambulance had revived a heartbeat but not breathing. (*Id.*) Ann Perlmutter never regained consciousness and died on May 26, 1992. (Noto Cert., ¶ 15). A toxicology report showed residue of cocaine in her blood. (Defendants' Br. at 3). The expert reports dispute the cause of her death.

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[1] "Face down" was defined as on her stomach with her head to the side. (Plaintiff's Br., Exh. A; Exh. B at 50).

[2] The exact medical treatment upon noticing her "totally still" is as follows:

> One of us checked for a pulse. Found no pulse. One of us were probably at the same time undoing the straps and I took her handcuffs off. We started CPR, bag valve mask and started chest compressions. The medics hooked her up to telemetry. I believe she was also intubated.

(Plaintiff's Br., Exh. B at 58).

ANALYSIS

I. Standard of Summary Judgment

Under Federal Rule of Civil Procedure 56(c), summary judgment should be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *See also Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893, 896 (3d Cir.) (*en banc*), *cert. dismissed*, 483 U.S. 1052 (1987).

In deciding a motion for summary judgment, the facts must be viewed in the light most favorable to the nonmoving party and any reasonable doubt as to the existence of a genuine issue of fact is to be resolved against the moving party. *Continental Insurance Co. v. Bodie*, 682 F.2d 436, 438 (3d Cir. 1982). The moving party has the burden of establishing that there exists no genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

The Supreme Court has stated that in applying the criteria for granting summary judgment,

> the judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented. The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff. The judge's inquiry, therefore, unavoidably asks whether reasonable jurors

> could find by a preponderance of the evidence that the plaintiff is entitled to a verdict. . . .

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986). A fact is "material" only if it will affect the outcome of a lawsuit under the applicable law, and a dispute over a material fact is "genuine" if the evidence is such that a reasonable fact finder could return a verdict for the nonmoving party. (*Id.*) In opposing a properly supported motion for summary judgment, the nonmoving party may not rest upon mere allegations or denials, but must produce sufficient evidence to reasonably support a jury verdict in its favor. (*Id.* at 249).

Plaintiff, by her own admission, is suing the BVES defendants under the Fifth, Eighth and Tenth Counts. (Plaintiff's Br. at 2). Thus, they are not defendants in the Fourth Count, the only Count that is expressly predicated upon 42 U.S.C. § 1983. That Count is based upon "[t]he actions taken by the defendant police officers." (Compl., Fourth Count, ¶ 2). In the Fifth Count, the BVES defendants are charged as co-conspirators with other defendants pursuant to 42 U.S.C. § 1985.[3] No § 1983 liability is alleged against the BVES defendants in the complaint. By long-standing judicial construction, a § 1985 claim may only be maintained where the plaintiff can show that " 'some racial or otherwise class-based, invidiously discriminatory animus [lay] behind the conspirators' action.' " *Bray v. Alexander Clinic*, ___ U.S. ___, 122 L. Ed. 2d 34, 45 (1993) (quoting *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971)). No such allegations appear anywhere

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[3] Presumably this reference is to § 1985(3) because parts (1) and (2) of § 1985 are not even arguably applicable here.

within the complaint. Accordingly, summary judgment for the BVES defendants on the Fifth Count is in order.

The Eighth Count charges the BVES defendants with negligence, gross negligence and intentional, malicious and/or reckless conduct in handling plaintiff's decedent. This is a claim only against the BVES defendants, predicated only on state law. Accordingly, it is before the Court only pursuant to pendent jurisdiction. In the sound exercise of its discretion, the Court will dismiss that Count, for lack of pendent jurisdiction, now that summary judgment has been granted on the only federal claim asserted against the BVES defendants. *United Mine Workers v. Gibbs,* 338 U.S. 715, 726 (1966).

The Tenth Count, in essence, asserts a *Monnell* claim against the alleged public entity defendants, including BVES. *See Monnell v. New York City Dept. of Social Services,* 436 U.S. 658 (1978). Critical to a *Monnell* claim against an agency employing one or more charged individuals is an underlying *bona fide* civil rights claim against such individuals. For the reasons stated immediately above, that is not the case. Without an underlying § 1985 claim (or a § 1983 claim) against the defendants Menzel and Depczek, no such claim may be made against BVES under *Monnell.*

Alternatively, while a *§ 1985* claim can be asserted against a party who is not a "state actor," a state actor is required for a *§ 1983* claim. Assuming, *arguendo,* that the Tenth Count seeks to assert against BVES a *Monnell* claim with a § 1983 underpinning, summary judgment must be awarded to that defendant because it is not a state actor within the contemplation of § 1983.

The defendants accurately assert that they are not sufficiently connected with the Township of Bloomfield or any of its agencies to subject the BVES or any of its members to 42 U.S.C. § 1983 liability. (Defendants' Br. at 5). To establish civil liability under 42 U.S.C. § 1983, a plaintiff must initially prove:

> (1) the conduct complained of was committed by a person acting under the color of state law; and
>
> (2) this conduct deprived the injured of rights, privileges, or immunities secured by the Constitution or laws of the United States.

Parratt v. Taylor, 451 U.S. 527, 532 (1981).

The primary issue thus becomes did BVES as an organization and its members act "under the color of state law." *McKinney v. West End Voluntary Ambulance Association,* 821 F. Supp. 1013, 1016 (E.D. Pa. 1992). The "under the color of state law requirement" is treated the same as the "state action" requirement of the fourteenth amendment. (*Id.*, citing *Lugar v. Edmonson Oil Co.,* 457 U.S. 922, 937 (1982)).

The purpose of the state actor requirement is to "assure that constitutional standards are invoked only when it can be said that the State is responsible for the specific conduct of which the plaintiff complains." (*Id.*, citing *Blum v. Yaretsky,* 457 U.S. 991, 1004 (1982)). The balance intended to be struck is "to preserve individual freedoms by limiting the reach of federal law and federal and judicial power and avoid imposing on the State, its agencies or officials, responsibility for conduct for which

they cannot be fairly blamed." (*Id.*, citing *Lugar*, 457 U.S. at 936).

The Supreme Court has never defined the exact parameters of state action. *Community Med. Center v. Emergency Med. Services*, 712 F.2d 878, 880 (3d Cir. 1983). The Court has stated that:

> only by sifting through the facts and weighing circumstances can the less than obvious involvement of the state in private conduct be attributed its true significance.

Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1961).

The Third Circuit has addressed this issue in a matter similar to the case at bar. *Community Med. Center v. Emergency Med. Services*, 712 F.2d 878 (3d Cir. 1983). In *Community Med. Center*, the defendant was a private, not-for-profit corporation that received grants from both the State of Pennsylvania and the U.S. Department of Health and Human Services. (*Id.* at 879). Emergency Med. Services' purpose was to coordinate emergency health care services in northeastern Pennsylvania. (*Id.*) The Pennsylvania Secretary of Health had designated Emergency Med. Services the lead agency for emergency medical service development in a five-county region. (*Id.*) The dismissal of the 42 U.S.C. § 1983 matter brought against Emergency Med. Services was affirmed because the Circuit determined that the not-for-profit corporation was not a state actor. (*Id.*)

Bloomfield Volunteer Emergency Squad is a private not-for-profit corporation organized under New Jersey law. (Karosen Cert., ¶ 2; Exh. A). Control of the Squad

rests with a board of trustees while the captain of the Squad and his assigns run the day-to-day operations. (*Id.*, ¶¶ 3, 4; Exh. B). The Squad rents space from the municipality for a nominal cost and owns its own equipment. (*Id.*, ¶ 5). This is done under a statutory grant of propriety. N.J.S.A. 40A:12-14, 15.

BVES does share the same dispatch service with the city services, but, as expounded in *McKinney*, that is not a sufficient nexus to make the BVES members state actors. *McKinney*, 821 F. Supp. at 1015. Nor should the letterhead for ambulance call reports cumulatively with the dispatch ties and the lease agreement create the sufficient nexus.[4] *Lugar*, 457 U.S. at 936. The BVES members are private citizens volunteering their own time, with money they raise and equipment they own. (Karosen Cert., ¶ 5).

The decisive inquiry in determining whether BVES is a state actor in light of its private status becomes: is "such a function traditionally the exclusive prerogative of the state." *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982). The plaintiff has not brought forward any evidence that emergency services are traditionally a function of the state. Furthermore, numerous other courts have found that ambulance/emergency services are not traditionally functions of the state. *See McKinney*, 821 F. Supp. at 1018; *Krieger v. Bethesda-Chevy Chase Rescue Squad*, 599 F. Supp. 770, 773 (D. Md. 1984); *Eggleston v. Prince Edward Volunteer Rescue Squad, Inc.*, 596 F. Supp. 1344, 1350-51 (E.D. Va.

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[4] The ambulance call report has a heading "Bloomfield Police Department" with a subheading of "BVES Ambulance Call Report." (Plaintiff's Br., Exh. H).

1983). Therefore, BVES and its members are not state actors.

Finally, to the extent that the Tenth Count could be construed as an effort to state a claim under state law, as well as under *Monnell*, it too must be dismissed for lack of pendent jurisdiction. While that Count, as pleaded, is being dismissed with prejudice on each of the two grounds discussed above, this Court offers no opinion as to whether a claim under state law could be maintained against that defendant in the courts of New Jersey.

CONCLUSION

For the reasons set forth above, the Fifth and Tenth Counts against the defendants F. Menzel, A. Depczek and the Bloomfield Volunteer Emergency Squad are being dismissed, with prejudice, on summary judgment for these defendants. The Eighth Count is dismissed, without prejudice, for lack of pendent jurisdiction. No further claims remain pending against those three defendants.

/s/ John W. Bissell
JOHN W. BISSELL
United States
District Judge

DATED: November 18, 1993

UNITED STATES
DISTRICT COURT
DISTRICT OF NEW JERSEY

DR. BARBARA LEE PERLMUTTER, General Administratrix and Administratrix ad Prosequendum of the Estate of Ann Perlmutter; and DR. BARBARA LEE PERLMUTTER, Individually,

Plaintiff,

v.

MICHAEL COOPER, Individually and as Police Officer of the Bloomfield Police Department; ROBERT HOCHSTUHL, Individually and as a Police Officer of the Bloomfield Police Department; PTL. PRIOLO, Individually and as a Police Officer of the Bloomfield Police Department; JOHN DOE, Individually and as a Police Officer of the Bloomfield Police Department; SGT. BEHRE, Individually and as a Police Officer of the Bloomfield Police Department; JOHN MC NIFF, Individually and as Chief of Police of the Bloomfield Police Department; THE POLICE DEPARTMENT OF THE TOWNSHIP OF BLOOMFIELD;

Civil Action No. 91-2140

ORDER

THE TOWNSHIP OF BLOOMFIELD; F. MENZEL, Individually and as Captain of the Bloomfield Volunteer Emergency Squad; A. DEPCZEK, Individually and as Attendant of the Bloomfield Volunteer Emergency Squad; JOHN DOE II, Individually and as Attendant of the Bloomfield Volunteer Emergency Squad; AMBULANCE ATTENDANT DAVIS, Individually and as Attendant of the Mountainside Hospital Mobil Intensive Care Unit, (MICU aka Med VII); DAN MAC MAHON, Individually and as Attendant of the Mountainside Hospital Mobile Intensive Care Unit (MICU aka Med VII); JOHN DOE III, Individually and as Attendant of the Mountainside Hospital Mobile Intensive Care Unit (MICU aka Med VII); and MOUNTAINSIDE HOSPITAL,

Defendants.

For the reasons set forth in the Court's Opinion filed herewith,

It is on this 18th day of November, 1993,

ORDERED that the motion of defendants Bloomfield Volunteer Emergency Squad, F. Menzel and A. Depczek for summary judgment on the Fifth and Tenth Counts of plaintiff's complaint be and it hereby is granted, and the

Fifth and Tenth Counts are hereby dismissed, with prejudice as to those defendants; and it is further

ORDERED that Count Eight of plaintiff's complaint be and it hereby is dismissed, without prejudice, for lack of pendent jurisdiction.

/s/ John W. Bissell
JOHN W. BISSELL
United States
District Judge

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

DR. BARBARA LEE PERLMUTTER, General Administratrix and Administratrix ad Prosequendum of the Estate of Ann Perlmutter; and DR. BARBARA LEE PERLMUTTER, Individually,	Civil Action No. 91-2140
Plaintiff,	**OPINION**
v.	
MICHAEL COOPER, Individually and as Police Officer of the Bloomfield Police Department; ROBERT HOCHSTUHL, Individually and as a Police Officer of the Bloomfield Police Department; PTL. PRIOLO, Individually and as a Police Officer of the Bloomfield Police Department; JOHN DOE, Individually and as a Police Officer of the Bloomfield Police Department; SGT. BEHRE, Individually and as a Police Officer of the Bloomfield Police Department; JOHN MC NIFF, Individually and as Chief of Police of the Bloomfield Police Department; THE POLICE DEPARTMENT OF THE TOWNSHIP OF BLOOMFIELD; THE TOWNSHIP OF BLOOMFIELD; F. MENZEL,	

Individually and as Captain of the Bloomfield Volunteer Emergency Squad; A. DEPCZEK, Individually and as Attendant of the Bloomfield Volunteer Emergency Squad; JOHN DOE II, Individually and as Attendant of the Bloomfield Volunteer Emergency Squad; AMBULANCE ATTENDANT DAVIS, Individually and as Attendant of the Mountainside Hospital Mobil Intensive Care Unit, (MICU aka Med VII); DAN MAC MAHON, Individually and as Attendant of the Mountainside Hospital Mobile Intensive Care Unit (MICU aka Med VII); JOHN DOE III, Individually and as Attendant of the Mountainside Hospital Mobile Intensive Care Unit (MICU aka Med VII); and MOUNTAINSIDE HOSPITAL,

Defendants.

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BISSELL, District Judge

This action, filed on May 16, 1991, involves federal civil rights claims accompanied by state law negligence claims. The death of Ann Perlmutter, the administratrix's daughter ("plaintiff"), while under the supervision of the Bloomfield Police, the Bloomfield Volunteer Emergency Squad ("BVES"), and the Mountainside Hospital Mobile Intensive Care Unit ("Mountainside Unit") prompted the bringing of this suit.

On November 18, 1993, this Court granted summary judgment to defendants BVES and its two members, Frederick Menzel and Andrew Depczek. These three parties were named in the Fifth, Eighth and Tenth Counts of

plaintiff's Complaint. The Fifth Count charged a conspiracy with other defendants to violate 42 U.S.C. § 1985. The Eighth Count charges BVES and its members with negligence. The Tenth Count alleges a breach of the plaintiff's constitutional rights pursuant to *Monnell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978).

Mountainside Hospital Mobile Intensive Care Unit, Attendant Davis and Dan MacMahon ("Mountainside defendants") have brought a motion for summary judgment. The Mountainside defendants are named in the Fifth, Ninth and Eleventh Counts of plaintiff's Complaint. As stated above, the Fifth Count charges a conspiracy to violate 42 U.S.C. § 1985. The Ninth Count alleges that the Mountainside defendants committed medical malpractice. A breach of the plaintiff's constitutional rights pursuant to *Monnell* is alleged in the Eleventh Count. *See Monnell*, 436 U.S. 658 (1978). This motions [sic] is today being granted as reflected in a separate Opinion.

Presently, defendants Michael Cooper, Robert Hochstuhl, Charles Priolo and Michael Behre ("police officers") have brought this motion for summary judgment. Claims against the police officers are asserted in the First, Second, Third, Fourth and Fifth Counts of plaintiff's Complaint. The First Count alleges a wrongful death claim pursuant to N.J.S.A. 2A:31-1. The Second Count alleges that a cause of action exists against the police officers pursuant to New Jersey's survival action statute, N.J.S.A. 2:15-3. The Third Count alleges that the police officers' wrongful acts deprived Dr. Barbara Perlmutter of support and companionship of her daughter, the decedent Ann Perlmutter. The Fourth Count alleges that the police offices [sic] violated the plaintiff's civil rights,

creating a claim pursuant to 42 U.S.C. § 1983. The Fifth Count alleges that the police officers conspired to deprive the plaintiff of her civil rights, violating 42 U.S.C. § 1985.

The Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1331.

FACTS

Ann Perlmutter died on May 26, 1989 as a result of an incident that occurred on May 29 [20], 1989. All of the defendants were brought into contact with the plaintiff decedent when she crashed through the window of Julia Sinauskas' basement apartment at 165 Franklin Street, Bloomfield, New Jersey on May 29 [20], 1989. (DiSomma Cert., Exh. F, Tr. 31:16-33:2). Ann Perlmutter resided at 165 Franklin Street as well. (*Id.*)

In response to the incident, the police officers, the BVES and the Mountainside Unit were dispatched to 165 Franklin Street. (*Id.*, Exh. D, Tr. 14:17-15:24). The police officers arrived at the scene first. (*Id.*) The BVES volunteers, Menzel and Depczek, were next to arrive. They were directed to a basement apartment of the building where they were told a woman had crashed through the resident's window. (*Id.*)

Ann Perlmutter was the woman who had crashed through the resident's window. When Menzel and Depczek initiated treatment of Ms. Perlmutter, she immediately began to thrash her arms and legs. (*Id.*, Exh. L, Tr. 24:20-25:11). The police officers responded by handcuffing Ms. Perlmutter's arms behind her back and tying her legs together with a bed sheet. (*Id.*) The police then

placed Ms. Perlmutter "face down" on a stretcher. (*Id.*, Exh. D, Tr. 37:20-38:10).[1] Menzel and Depczek strapped her to the stretcher. (*Id.*) The decedent continued to move and yell while she was being removed on the stretcher. (*Id.*, Exh. F, Tr. 50:5-13; Exh. G, Tr. 90:16-20; Exh. J, Tr. 63:15-20; Exh. H, Tr. 49:22-50:7).

The Mountainside defendants, in their capacity as Mountainside Hospital Intensive Care Unit Paramedics, were the last to arrive. (*Id.*, Exh. L, Tr. 23:10-24:18). While the plaintiff was being restrained and moved out of the apartment, the Mountainside defendants retrieved the medical equipment and put it into the BVES ambulance. (*Id.*)

After carrying her out of the apartment, the BVES volunteers strapped Ms. Perlmutter to a rolling cot, "face down" again. (*Id.*) As they wheeled the plaintiff to the ambulance, Menzel and Depczek noticed that Ms. Perlmutter had become "totally quiet." (*Id.*, Exh. H. Tr. 55:25-56:7). Upon closer examination, the BVES volunteers observed that she was not breathing. (*Id.*) They immediately removed the handcuffs and restraining straps. (*Id.*) The Mountainside paramedics and the BVES members then turned Ms. Perlmutter over and began medical treatment to try to revive her. (*Id.*)[2]

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[1] "Face down" was defined as on her stomach with her head to the side. (DiSomma Cert., Exh. H, 50:2-7).

[2] The exact medical treatment upon noticing her "totally still" is as follows:

> One of us checked for a pulse. Found no pulse. One of us were probably at the same time undoing the straps and I took her handcuffs off. We started CPR, bag

While traveling to the hospital, the medical treatment in the ambulance revived Ms. Perlmutter's heartbeat but not her breathing. (*Id.*) Ann Perlmutter never regained consciousness. (*Id.*, Exh. E, Tr. 39:25-41:24). She died on May 26, 1989. (*Id.*) A toxicology report showed the residue of cocaine in her blood. (*Id.*, Exh. F, Tr. 31:16-33:2).

ANALYSIS

Standard of Summary Judgment

Under Federal Rule of Civil Procedure 56(c), summary judgment should be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *See also Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893, 896 (3d Cir.) (*en banc*), *cert. dismissed*, 483 U.S. 1052 (1987).

In deciding a motion for summary judgment, the facts must be viewed in the light most favorable to the nonmoving party and any reasonable doubt as to the existence of a genuine issue of fact is to be resolved against the moving party. *Continental Insurance Co. v. Bodie*, 682 F.2d 436, 438 (3d Cir. 1982). The moving party has the burden of establishing that there exists no genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

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valve mask and started chest compressions. The medics hooked her up to telemetry. I believe she was also intubated.

(DiSomma Cert., Exh. H, 58:12-19).

The Supreme Court has stated that in applying the criteria for granting summary judgment,

> the judge just [must] ask himself not whether he thinks the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented. The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff. The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict. . . .

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986). A fact is "material" only if it will affect the outcome of a lawsuit under the applicable law, and a dispute over a material fact is "genuine" if the evidence is such that a reasonable fact finder could return a verdict for the nonmoving party. (*Id.*) In opposing a properly supported motion for summary judgment, the nonmoving party may not rest upon mere allegations or denials, but must produce sufficient evidence to reasonably support a jury verdict in its favor. (*Id.* at 249).

Police Officers' Violation of Decedent's Civil Rights

The Civil Rights Act, 42 U.S.C. § 1983, provides that:

> [e]very person who, under color of a statute, ordinance, regulation, custom, or usage, of any State . . . , subjects, or causes to be subjected any citizen of the United States or another person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured

> by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity, or other proper procedure for redress. . . .

Rodriguez v. City of Passaic, 730 F. Supp. 1314, 1319 (D.N.J. 1990). In order to be a viable action, a claim brought under 42 U.S.C. § 1983 needs to identify a separate federally conferred right. *Graham v. Connor*, 490 U.S. 386, 394 (1989) (citing *Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979)). Claims for "excessive force" will mostly be based on "the Fourth Amendment's prohibition against unreasonable seizures of the person or the Eighth Amendment's ban on cruel and unusual punishments." (*Id.*) In instances where the claim is based on an investigatory stop of a free citizen, the fourth amendment "objective reasonableness" standard is the appropriate measure to determine whether "excessive force" was used. (*Id.*, citing *Tennessee v. Garner*, 471 U.S. 1, 7-8 (1985)). Not only does a plaintiff need to prove that a federally conferred right has been interfered with but she must also show that the actor did it "under the color of state law." *Rodriguez*, 730 F. Supp. at 1319 (citing *West v. Atkins*, 487 U.S. 42 (1988)).

The Fourth Amendment

In *Graham v. Connor*, a police officer made an investigatory stop while the detainee was experiencing insulin shock. *Graham*, 490 U.S. at 388. The officer ordered the detainee to wait while he examined the circumstances that prompted the stop. (*Id.*) The investigation occurred despite the pleadings from the individual accompanying the detainee that the circumstances were created by "sugar shock." (*Id.*)

Other officers responded in the interim, handcuffed the detainee and pressed his face against the hood of the car, ultimately causing assorted injuries. (*Id.* at 389). The detainee was released once the story concerning "sugar shock" was corroborated. (*Id.*) The now former detainee filed a 42 U.S.C. § 1983 action against the officers. (*Id.*) The Supreme Court determined that this action was controlled by the federal rights provided under the fourth amendment. (*Id.* at 389). Therefore, the Supreme Court determined that an "objective reasonableness" analysis and not a substantive due process analysis was appropriate. (*Id.*)

Plaintiff's claim that the police officers infringed upon her civil rights concerns events surrounding the police officers' attempts to restrain the decedent in the course of a pre-arrest detention. (DiSomma Cert., Exh. D, Tr. 22:14-24). The police officers were present because the decedent crashed through a neighbor's window. (*Id.*) The purpose of the restraint was to remove the decedent from the apartment and enable the medical personnel to provide her with care. (*Id.*, Exh. F, Tr. 52:21-25). Plaintiff alleges that in the course of restraining the decedent, the police officers used "excessive force." (*Id.*, Exh. A, Compl, ¶¶ 5 and 6). To establish a civil rights violation for "excessive force," the plaintiff needs to establish that the force used to restrain the decedent was not reasonable under the circumstances. *Graham*, 490 U.S. at 398.

Reasonableness must be judged

> from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. . . . The calculus of reasonableness must embody allowance for the fact that police

> officers are often forced to make split-second judgments, in circumstances that are tense, uncertain, and rapidly evolving, about the amount of force that is necessary in a particular situation.

(*Id.* at 396-97; *see also Rodriguez v. City of Passaic*, 730 F. Supp. 1314, 1322 (D.N.J. 1990), *aff'd*, 914 F.2d 244 (3d Cir. 1990).

In the matter presently before the Court, the police officers ultimately restrained the decedent by handcuffing her wrists behind her back and securing her ankles with a bed sheet. (DiSomma Cert., Exh. F, Tr. 41:17-42:1). Before the police officers restrained the decedent, she had wandered around the apartment whose window she had crashed through. (*Id.*, Exh. D., Tr. 22:14-24). The decedent then proceeded to roll on the floor, thrashing her arms and legs and making unintelligible noises. (*Id.*, Exh. F, Tr. 35:9-17; Exh. G, Tr. 72:4; Exh. D, Tr. 28:7-20). The police officers assert they restrained the decedent in the manner described above to protect themselves, the occupant of the apartment, the medical personnel and the decedent. (*Id.*, Exh. F, Tr. 41:24-41:1; Exh. M, Tr. 120:8-17; Exh. L, Tr. 75:21-76:19).

Plaintiff contends that the presence of medical personnel should alter what is reasonable under the circumstances. (Plaintiff's Br. at 12). Plaintiff tries to categorize the events surrounding Ms. Perlmutter's detention as a medical emergency, making the police officers' alleged unilateral act unreasonable under the circumstances. (*Id.*) This Court disagrees.

Ms. Perlmutter entered into Julia Sinauskas' basement apartment by crashing through a sealed window. Ms. Sinauskas summoned the police officers. There is no evidence that the decedent was in distress when restrained and placed on the stretcher. Rather, there is proof that the moment the medical technicians observed Ms. Perlmutter to have ceased breathing, they immediately released all restraints and initiated treatment.

When a court attempts to determine the reasonableness of a police officer's action it must:

> stand in his shoes and judge the reasonableness of his actions based on the information he possessed and the judgment he exercised in responding to that situation. Knowledge of facts and circumstances gained by the officer after the completion of the act is irrelevant to a determination of the reasonableness of that officer's judgment vis-a-vis the conduct at issue.

Rodriguez, 730 F. Supp. at 1322 (citing *Sherrod v. Berry*, 856 F.2d 802, 804-805 (7th Cir. 1988). Taking into account all of the facts and circumstances surrounding the restraint of Ann Perlmutter, this Court determines that the amount of force the police officers used to restrain the decedent was reasonable under the circumstances. No rational jury could find otherwise. Therefore, the police officers did not violate Ms. Perlmutter's fourth amendment rights.

Substantive Due Process

Claims of excessive force originating from a detention of a free citizen are to be examined under the "objective reasonableness" standard of the fourth amendment.

Graham, 490 U.S. at 395. Substantive due process under the fourteenth amendment as described in *Johnson v. Glick*, 481 F.2d 1028, 1032 (2d Cir. 1973), and adopted by the Third Circuit in *Curtis v. Everrette*, 489 F.2d 516, 518 (3d Cir. 1974), is no longer applicable to these forms of 42 U.S.C. § 1983 actions. Therefore, claims under the fourteenth amendment are unavailable in this instance.

The Eighth Amendment: Cruel and Unusual Punishment.

The eighth amendment's prohibition against cruel and unusual punishment "is implicated only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions." *Rodriguez*, 730 F. Supp. at 1319. The state must first obtain the power to punish, which is predicated by a party being judged guilty after being afforded due process [sic] law. (*Id.*, citing *City of Revere v. Massachusetts General Hosp.*, 463 U.S. 239, 244 (1983)). Since Ms. Perlmutter had not been convicted of a crime, the eighth amendment is not implicated. (*Id.* at 1320).

Qualified Immunity

Qualified immunity shields government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). A right is "clearly established" only where it is sufficiently clear that the objectively reasonable official, in hindsight would have understood that the alleged conduct violated

that right. *Rodriguez*, 730 F. Supp. at 1326-27 (citing *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). Considering this Court's determination that the police officers acted reasonably when they restrained the decedent, their conduct did not violate a clearly established constitutional right.

Conspiracy to Deprive Plaintiff of a Right Secured by the Constitution

A conspiracy to interfere with an individual's civil rights exists if:

> two or more persons in any State or Territory conspire . . . for the purpose of depriving either directly or indirectly, any person . . . of equal protection of the laws . . . [and] one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of the conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured . . . may have an action for damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S.C. § 1985(3). To have a viable conspiracy action under 42 U.S.C. § 1985, the plaintiff must establish that the conspirators committed some act in furtherance of the conspiracy. *Griffin v. Breckenridge*, 403 U.S. 88, 103-104 (1971); *Bethel v. Jendoco Construction Corp.*, 570 F.2d 1168, 1172-73 (3d Cir. 1978). Plaintiff alleges that "[t]he use of unreasonable and unnecessary force against the decedent Ann Perlmutter constituted an overt act in furtherance of a conspiracy between the [police officers] to deprive the

decedent of her civil rights." (DiSomma Cert., Exh. A, Fifth Count, ¶ 2). This Court has determined that as a matter of law, the force used by the police officers was reasonable. Therefore, the plaintiff cannot establish that the conspirators committed some act in furtherance of the conspiracy.

In addition, for the reasons set forth at pages 7-8 of this Court's companion Opinion dismissing claims against the Mountainside Mobil ICU defendants, plaintiff has not made an adequate showing that any racial animus motivated the actions of any defendant herein.

John McNiff, individually and as Chief of police of the Bloomfield Police Department, the Police Department of the Township of Bloomfield, and the Township of Bloomfield are also defendants in the within action. Those defendants did not formally join the motion of the defendants Bloomfield police officers. However, this Court will also grant summary judgment in favor of those defendants.

Even when a party has not moved for summary judgment, the Court may, in appropriate circumstances, enter summary judgment in favor of such a party. *Thorn v. County of Monroe*, 586 F. Supp. 1085, 1087 n.5 (M.D. Pa. 1985); *Jackson v. Hammock*, 330 F. Supp. 1124, 1125 (E.D. Pa. 1971). After full arguments and considering the briefs on the issue, a district court can grant a nonmoving party summary judgment. *United States v. Cless*, 150 F. Supp. 687, 692 (M.D. Pa. 1957), *aff'd*, 254 F.2d 590 (3d Cir. 1958).

In the case at bar, any liability of the defendants McNiff, Bloomfield Police Department and the Township of Bloomfield can only be predicated upon *Monnell v. New*

York City Dept. of Social Services, 436 U.S. 658 (1978). The issues involving *Monnell* liability have been fully briefed, argued and adjudicated in connection with the prior motions of defendants Bloomfield Volunteer Emergency Squad and Mountainside Hospital for summary judgment. There being no underlying viable claim under § 1983 or § 1985 against the individual defendants allegedly supervised and/or trained by such defendants as McNiff, Bloomfield Police Department and Bloomfield, no *Monnell* claim may be maintained against the latter. *See* Opinion of Nov. 18, 1993 at 7-8; Opinion of June 1, 1994 re: Mountainside defendants at 9. *Monnell* liability having been fully and fairly litigated regarding other motions, and its applicability to the present motions being obvious, summary judgment may and will be granted in favor of the defendants McNiff, Bloomfield Police Department and the Township of Bloomfield.

State Law Claims

The dismissal of the federal claims against the police officers raises the question as to whether the state law claims should remain before this Court. Congress has recently enacted a supplemental jurisdiction statute stating that:

> in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the [ ] Constitution.

28 U.S.C. § 1367(a) (1990).

Section 1367 gives the district court discretion to decline to grant supplemental jurisdiction. 28 U.S.C. § 1367(c) (1990). The statute provides that:

> the district courts may decline to exercise supplemental jurisdiction over a claim under (a) if:
>
> (1) the claim raises a novel or complex issue of State law,
>
> (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
>
> (3) the district court has dismissed all claims over which it has original jurisdiction,
>
> (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

28 U.S.C. § 1367(c) (1990).

All claims over which this Court would have original jurisdiction have now been dismissed due to summary judgments in favor of the respective defendants. Claims under state law focus upon medical malpractice as to some defendants and upon the New Jersey Tort Claims Act as to others, such as the Bloomfield defendants to whom the present Opinion is addressed. These claims are best addressed in the Superior Court of the State of New Jersey. Accordingly, they will be dismissed without prejudice.

CONCLUSION

For the reasons set forth above, summary judgment is hereby granted in favor of all defendants named in the Fourth through Seventh Counts, inclusive, and the Eleventh Count; and those Counts are dismissed, with prejudice. Also, claims based upon state law, as set forth in the First, Second, Third and Tenth Counts are dismissed, without prejudice, pursuant to 28 U.S.C. § 1367(c). With the entry of this Opinion and Order, no further claims of the plaintiff remain in this action.

/s/ John W. Bissell
JOHN W. BISSELL
United States District Judge

DATED: June 7, 1994

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

DR. BARBARA LEE PERLMUTTER, General Administratrix and Administratrix ad Prosequendum of the Estate of Ann Perlmutter; and DR. BARBARA LEE PERLMUTTER, Individually,

Plaintiff,

v.

MICHAEL COOPER, Individually and as Police Officer of the Bloomfield Police Department; ROBERT HOCHSTUHL, Individually and as a Police Officer of the Bloomfield Police Department; PTL. PRIOLO, Individually and as a Police Officer of the Bloomfield Police Department; JOHN DOE, Individually and as a Police Officer of the Bloomfield Police Department; SGT. BEHRE, Individually and as a Police Officer of the Bloomfield Police Department; JOHN MC NIFF, Individually and as Chief of Police of the Bloomfield Police Department; THE POLICE DEPARTMENT OF THE TOWNSHIP OF BLOOMFIELD; THE TOWNSHIP OF BLOOMFIELD; F. MENZEL, Individually and as Captain of the Bloomfield Volunteer Emergency Squad; A. DEPCZEK, Individually and as-Attendant of the Bloomfield Volunteer Emergency

Civil Action
No. 91-2140

ORDER

(Filed
June 7, 1994)

Squad; JOHN DOE II, Individually and as Attendant of the Bloomfield Volunteer Emergency Squad; AMBULANCE ATTENDANT DAVIS, Individually and as Attendant of the Mountainside Hospital Mobil Intensive Care Unit, (MICU aka Med VII); DAN MAC MAHON, Individually and as Attendant of the Mountainside Hospital Mobile Intensive Care Unit (MICU aka Med VII); JOHN DOE III, Individually and as Attendant of the Mountainside Hospital Mobile Intensive Care Unit (MICU aka Med VII); and MOUNTAINSIDE HOSPITAL,

Defendants.

For the reasons set forth in the Court's Opinion filed herewith,

It is on this 7th day of June, 1994,

ORDERED that summary judgment is hereby granted in favor of all defendants named in the Fourth through Seventh and the Eleventh Counts of plaintiff's Complaint, and those Counts are hereby dismissed, with prejudice; and it is further

ORDERED that the First, Second, Third and Tenth Counts of plaintiff's Complaint are hereby dismissed, without prejudice.

/s/ John W. Bissell
JOHN W. BISSELL
United States District Judge

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

DR. BARBARA LEE PERLMUTTER, General Administratrix and Administratrix ad Prosequendum of the Estate of Ann Perlmutter; and DR. BARBARA LEE PERLMUTTER, Individually,	:	Civil Action No. 91-2140
Plaintiff,	:	**OPINION**
v.	:	
MICHAEL COOPER, Individually and as Police Officer of the Bloomfield Police Department; ROBERT HOCHSTUHL, Individually and as a Police Officer of the Bloomfield Police Department; PTL. PRIOLO, Individually and as a Police Officer of the Bloomfield Police Department; JOHN DOE, Individually and as a Police Officer of the Bloomfield Police Department; SGT. BEHRE, Individually and as a Police Officer of the Bloomfield Police Department; JOHN MC NIFF, Individually and as Chief of Police of the Bloomfield Police Department; THE POLICE DEPARTMENT OF THE TOWNSHIP OF BLOOMFIELD; THE TOWNSHIP OF BLOOMFIELD; F. MENZEL, Individually and as Captain of the Bloomfield Volunteer Emergency Squad; A. DEPCZEK,	:	

Individually and as Attendant of the Bloomfield Volunteer Emergency Squad; JOHN DOE II, Individually and as Attendant of the Bloomfield Volunteer Emergency Squad; AMBULANCE ATTENDANT DAVIS, Individually and as Attendant of the Mountainside Hospital Mobil Intensive Care Unit, (MICU aka Med VII); DAN MAC MAHON, Individually and as Attendant of the Mountainside Hospital Mobile Intensive Care Unit (MICU aka Med VII); JOHN DOE III, Individually and as Attendant of the Mountainside Hospital Mobile Intensive Care Unit (MICU aka Med VII); and MOUNTAINSIDE HOSPITAL,

Defendants.

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BISSELL, *District Judge*

This action, filed on May 16, 1991, involves federal civil rights claims accompanied by state law negligence claims. The death of Ann Perlmutter, the administratrix's daughter ("plaintiff"), while under the supervision of the Bloomfield Police, the Bloomfield Volunteer Emergency Squad ("BVES"), and the Mountainside Hospital Mobile Intensive Care Unit ("Mountainside Unit") prompted the bringing of this suit.

On November 18, 1993, this Court granted summary judgment to defendants BVES and its two members, Frederick Menzel and Andrew Depczek. These three parties were named in the Fifth, Eighth and Tenth Counts of

plaintiff's Complaint. The Fifth Count charged a conspiracy with other defendants to violate 42 U.S.C. § 1985. The Eighth Count charges BVES and its members with negligence. The Tenth Count alleges a breach of the plaintiff's constitutional rights pursuant to *Monnell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978).

Mountainside Hospital Mobile Intensive Care Unit, Attendant Davis and Dan MacMahon ("Mountainside defendants") have brought a motion for summary judgment. The Mountainside defendants are named in the Fifth, Ninth and Eleventh Counts of plaintiff's Complaint. As stated above, the Fifth Count charges a conspiracy to violate 42 U.S.C. § 1985. The Ninth Count alleges that the Mountainside defendants committed medical malpractice. A breach of the plaintiff's constitutional rights pursuant to *Monnell* is alleged in the Eleventh Count. *See Monnell*, 436 U.S. 658 (1978).

The Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1331.

FACTS

Ann Perlmutter died on May 26, 1989 as a result of an incident that occurred on May 20, 1989. (Noto Cert., ¶ 2). The act that brought all of the defendants into contact with the plaintiff was Ann Perlmutter crashing through the window of Julia Sinauskas' basement apartment at 165 Franklin Street, Bloomfield, New Jersey. (Defendants' Br. at 1). 165 Franklin Street was also Ann Perlmutter's residence. (Noto Cert., ¶ 1).

In response to the incident, the Bloomfield Police, the BVES and the Mountainside Unit were dispatched to 165 Franklin Street. (Defendants' Br. at 1 and Exh. B at 65, ls. 3-7). As members of the BVES, Menzel and Depczek arrived on the scene and were directed to a basement apartment of the building. (Noto Cert., ¶ 4). They were told a woman had allegedly crashed through the resident's window. (*Id.*) When Menzel and Depczek initiated treatment of Ms. Perlmutter, she immediately thrashed her arms and legs. (*Id.*, ¶ 5). The police officers then handcuffed Ms. Perlmutter's arms behind her back and tied her legs together with a bed sheet. (*Id.*) The police placed Ms. Perlmutter "face down" on a stretcher. (*Id.*, ¶ 7).[1] Menzel and Depczek strapped her to the stretcher. (*Id.*)

The Mountainside defendants, in their capacity as Mountainside Hospital Intensive Care Unit paramedics, were the last to arrive. (Defendants' Br. at 2). While the plaintiff was being restrained and moved out of the apartment, the Mountainside defendants were putting medical equipment into the BVES ambulance. (*Id.*)

After carrying her out of the apartment, the BVES volunteers strapped Ms. Perlmutter to a rolling cot, "face down" again. (Noto Cert., ¶¶ 9-11). As they wheeled the plaintiff to the ambulance, Menzel and Depczek noticed that Ms. Perlmutter had become "totally quiet." (*Id.*, ¶ 12). Upon closer examination, the BVES volunteers observed that she was not breathing. (*Id.*) They immediately

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[1] "Face down" was defined as on her stomach with her head to the side. (Menzel Dep. at 50, ls. 2-7).

removed the handcuffs and restraining straps. (*Id.*, ¶ 13). The Mountainside paramedics and the BVES members then turned Ms. Perlmutter over and began medical treatment to try to revive her. (*Id.*)[2] While traveling to the hospital, the medical treatment in the ambulance revived Ms. Perlmutter's heartbeat but not her breathing. (*Id.*, ¶ 14). Ann Perlmutter never regained consciousness. (*Id.*, ¶ 15). She died on May 26, 1989. (*Id.*) A toxicology report showed the residue of cocaine in her blood. (Defendants' Br. at 3).

ANALYSIS

I. Standard of Summary Judgment

Under Federal Rule of Civil Procedure 56(c), summary judgment should be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *See also Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893, 896 (3d Cir.) (*en banc*), *cert. dismissed*, 483 U.S. 1052 (1987).

In deciding a motion for summary judgment, the facts must be viewed in the light most favorable to the

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[2] The exact medical treatment upon noticing her "totally still" is as follows:

> One of us checked for a pulse. Found no pulse. One of us were probably at the same time undoing the straps and I took her handcuffs off. We started CPR, bag valve mask and started chest compressions. The medics hooked her up to telemetry. I believe she was also intubated.

(Menzel Dep. at 58, ls. 12-19).

nonmoving party and any reasonable doubt as to the existence of a genuine issue of fact is to be resolved against the moving party. *Continental Insurance Co. v. Bodie*, 682 F.2d 436, 438 (3d Cir. 1982). The moving party has the burden of establishing that there exists no genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

The Supreme Court has stated that in applying the criteria for granting summary judgment,

> the judge just ask himself not whether he thinks the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented. The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff. The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict. . . .

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986). A fact is "material" only if it will affect the outcome of a lawsuit under the applicable law, and a dispute over a material fact is "genuine" if the evidence is such that a reasonable fact finder could return a verdict for the nonmoving party. (*Id.*) In opposing a properly supported motion for summary judgment, the nonmoving party may not rest upon mere allegations or denials, but must produce sufficient evidence to reasonably support a jury verdict in its favor. (*Id.* at 249).

II. The Section 1985 Conspiracy

This Court addressed the viability of plaintiff's charge of a conspiracy to interfere with Ms. Perlmutter's civil rights in the opinion granting BVES' motion for summary judgment. (Op. of Nov. 18, 1993 at 6). The conspiracy charge was dismissed as it applied to BVES, Menzel and Depczek because the claim lacked an allegation of "some racial or otherwise class-based, invidiously discriminatory animus behind the conspirators' action." (*Id.* (citing *Bray v. Alexander Clinic*, ___ U.S. ___, 113 S. Ct. 753, 755 (1993) (quoting *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971)).

In the BVES opinion, this Court held that no applicable "discriminatory animus" was alleged in the Complaint. (Op. of Nov. 18, 1993 at 7). The Court specifically determined that 42 U.S.C. § 1983 liability was only alleged against the defendant police officers in this Complaint. (*Id.* at 6). Regardless, the Mountainside defendants are not "state actors" within the purview of § 1983. (*Id.* at 9) (citing *Community Med. Center v. Emergency Med. Services*, 712 F.2d 878, 880 (3d Cir. 1983)).

"When a court decides upon a rule of law, that rule should continue to govern the same issues in subsequent stages of the litigation." *In re Resyn Corporation*, 945 F.2d 1279, 1281 (3d Cir. 1991). Plaintiff relies on assertions made by the Mountainside defendants that they coordinate medical services with BVES and the Bloomfield police as evidence of the existence of a conspiracy. (Perlmutter's March 2, 1994 letter and attached depositions). The existence of these communications do not establish the discriminatory intent necessary to establish a § 1985

conspiracy. *Bray*, ___ U.S. ___, 113 S. Ct. at 755. Therefore, summary judgment for the Mountainside defendants is appropriate on the Fifth Count. (Op. of Nov. 18, 1993 at 7).[3]

III. The Monnell Claim

This Court has also addressed the viability of a *Monnell* claim against a private, not-for-profit ambulance service in conjunction with this action. (Op. of Nov. 18, 1993 at 7-8). The essence of a *Monnell* claim is the failure of a public entity to supervise and instruct its agents. (*See* Complaint at Tenth and Eleventh Counts). This Court has held that without a § 1985 or § 1983 claim against the individual defendants, no *Monnell* claim can be brought against an organization. (Op. of Nov. 18, 1993 at 8). No § 1985 of [sic] § 1983 claim exists against defendants Attendant Davis and Dan MacMahon; therefore, no *Monnell* claim can be sustained against Mountainside Hospital.

Alternatively, this Court has addressed the unavailability of a 42 U.S.C. § 1983 claim against a private, not-for-profit ambulance service. (*Id.* at 8-10). The

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[3] Plaintiff adds that the designation of Ann Perlmutter as white on incident reports when she is in fact black creates at least a permissible inference of a racial animus or racially motivated cover-up which will allow her claim to survive summary judgment. This tenuous speculation, however, does not raise a *genuine* issue of material fact. Such an entry is consistent with either a mistake or a genuine belief that plaintiff was white. The record evidence points to the latter.

Mountainside Hospital Intensive Care Unit is also a private, not-for-profit ambulance service. (Defendants' Br. at 15). The law of the case dictates that this reasoning, which prevented § 1983 liability from attaching to BVES, prohibits § 1983 liability from attaching to the Mountainside defendants under the Eleventh Count. *In re Resyn Corporation*, 945 F.2d at 1281.

IV. Medical Malpractice

The Ninth Count charges the Mountainside defendants with not employing the care and skill ordinarily used by mobile intensive care unit attendants. The Court could entertain this claim herein on the basis of supplemental jurisdiction. 28 U.S.C. § 1367. However, in a companion opinion all other claims against all defendants are being dismissed. Accordingly, the Court will also dismiss this claim, but without prejudice.

V. Motion to Reconsider the BVES Opinion

Motions for reconsideration are governed by General Rule 12I, which states as follows:

> A motion for reargument shall be served and filed within 10 days after the filing of the Court's order or judgment on the original motion. There shall be served with the notice a memorandum setting forth concisely the matters or controlling decisions which counsel believes the Court has overlooked. No oral argument shall be heard unless the Court grants the motion and specifically directs that the matter shall be reargued orally.

In most instances, a motion for reargument under General Rule 12I is considered a motion for reconsideration under Fed. R. Civ. P. 59(e). *See e.g. Federal Kemper Ins. Co. v. Rauscher,* 807 F.2d 345, 348 (3d Cir. 1986). Furthermore, there is considerable overlap between Fed. R. Civ. P. 59(e) and 60(b) such that a motion designated as one may be decided under the other. *See e.g. Conway v. Johnson,* 115 F.R.D. 603 (N.D. Cal. 1987) (citing *Moore's Federal Practice* ¶ 60.22[2] at 60-138 to 60-139, and 11 C. Wright & A. Miller, *Federal Practice and Procedure* § 2817 at 110).

The purpose of a motion for reconsideration is to correct manifest errors of law or fact or to present newly discovered evidence. *Harsco Corp. v. Zlotnicki,* 779 F.2d 906, 909 (3d Cir. 1985). Where the evidence is not newly discovered, it may not be presented in support of a motion for reconsideration. (*Id; see also Keene Corp. v. International Fidelity Ins. Co.,* 561 F. Supp. 656, 665 (N.D. Ill. 1982) ("Such motions cannot . . . be employed as a vehicle to introduce new evidence that could have been adduced during pendency of the summary judgment motion.")

Furthermore, it is well settled that a motion for reargument under General Rule 12I must do more than just express disagreement or dissatisfaction with the court's previous decision. Such concerns "should be dealt with in the normal appellate process, not on a motion for reargument under Local Rule 12(I)." *Florham Park Chevron, Inc. v. Chevron U.S.A., Inc.,* 680 F. Supp. 159, 163 (D.N.J. 1988); *see also Carteret Savings Bank, F.A. v. Shushan,* 721 F. Supp. 705, 706 (D.N.J. 1989) (stating that a motion under General Rule 12I must present more than "a recapitulation of the cases and arguments considered by this Court before

rendering its original decision.") (*See generally* Lite, *New Jersey Federal Practice Rules,* Comment to Rule 12I).

Contained in the opposition to the Mountainside defendants' motion to dismiss is a request by Ms. Perlmutter that this Court reconsider its previous decision concerning BVES and its members. (Plaintiff's Br. at 5; Perlmutter Letter of March 2, 1994 at 4). This brief request does not come close to complying with the necessary requirements of a motion or cross-motion for relief from a judgment. Fed. R. Civ. P. 59 and 60. Nor does it comply with the strictly construed procedural requirements of the General Rules of the District of New Jersey. *See* General Rule 12I.

Moreover, plaintiff's request to reconsider this Court's dismissal of the claims against BVES and its members only expresses disagreement and dissatisfaction with an earlier decision of this Court. (Plaintiff's Br. at 5; Perlmutter Letter of March 2, 1994 at 4). Excluding for a moment the fact that no information has been presented to this Court which would lead it to believe that its BVES decision is incorrect, the motion is time barred as well as procedurally and substantively flawed.

CONCLUSION

In light of the foregoing, Mountainside Hospital, Attendant Davis and Dan MacMahon's motion for summary judgment is granted. Accordingly, as to those defendants, the Fifth and Eleventh Counts in plaintiff's Complaint are dismissed with prejudice. The Ninth Count in the Complaint is dismissed without prejudice.

Plaintiff's request to reconsider this Court's BVES opinion is denied.

/s/ John W. Bissell
JOHN W. BISSELL
United States District Judge

DATED: June 7, 1994

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

DR. BARBARA LEE PERLMUTTER, General Administratrix and Administratrix ad Prosequendum of the Estate of Ann Perlmutter; and DR. BARBARA LEE PERLMUTTER, Individually,

Plaintiff,

v.

MICHAEL COOPER, Individually and as Police Officer of the Bloomfield Police Department; ROBERT HOCHSTUHL, Individually and as a Police Officer of the Bloomfield Police Department; PTL. PRIOLO, Individually and as a Police Officer of the Bloomfield Police Department; JOHN DOE, Individually and as a Police Officer of the Bloomfield Police Department; SGT. BEHRE, Individually and as a Police Officer of the Bloomfield Police Department; JOHN MC NIFF, Individually and as Chief of Police of the Bloomfield Police Department; THE POLICE DEPARTMENT OF THE TOWNSHIP OF BLOOMFIELD; THE TOWNSHIP OF BLOOMFIELD; F. MENZEL,

Civil Action
No. 91-2140

ORDER

(Filed
Jun. 7, 1994)

Individually and as Captain of the Bloomfield Volunteer Emergency Squad; A. DEPCZEK, Individually and as Attendant of the Bloomfield Volunteer Emergency Squad; JOHN DOE II, Individually and as Attendant of the Bloomfield Volunteer Emergency Squad; AMBULANCE ATTENDANT DAVIS, Individually and as Attendant of the Mountainside Hospital Mobil Intensive Care Unit, (MICU aka Med VII); DAN MAC MAHON, Individually and as Attendant of the Mountainside Hospital Mobile Intensive Care Unit (MICU aka Med VII); JOHN DOE III, Individually and as Attendant of the Mountainside Hospital Mobile Intensive Care Unit (MICU aka Med VII); and MOUNTAINSIDE HOSPITAL,

Defendants.

For the reasons set forth in the Court's Opinion filed herewith,

It is on this 7th day of June, 1994,

ORDERED that the motion of defendants Mountainside Hospital Mobile Intensive Care Unit, Attendant Davis and Dan MacMahon for summary judgment be and it hereby is granted and, as to those defendants, the Fifth and Eleventh Counts of plaintiff's complaint are hereby

dismissed with prejudice and the Ninth Counts [sic] is hereby dismissed without prejudice.

/s/ John W. Bissell
JOHN W. BISSELL
United States District Judge

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

DR. BARBARA LEE PERLMUTTER, et al., Plaintiff, v. MICHAEL COOPER, et al., Defendants.	:	Hon. John W. Bissell Civil Action No. 91-2140 **OPINION** (Filed Aug. 23, 1994)

BISSELL, District Judge

Plaintiff and defendants submit cross-motions for reconsideration of the June 7, 1994 decisions to dismiss the present action on summary judgment. They have filed their motions pursuant to New Jersey Local Rule 12I.

Plaintiff specifically requests that the Court reconsider whether the Mountainside Hospital Mobile Intensive Care Unit and attendants named as individuals ("Mountainside defendants"), Township of Bloomfield, The Police Department of the Township of Bloomfield ("the municipal defendants"), and several police officers in both their official and individual capacities ("police officers") violated the plaintiff's civil rights based on 42 U.S.C. § 1983, and conspired to deprive plaintiff of her civil rights based on 42 U.S.C. § 1985. In addition, plaintiff asks that the Court reconsider the accompanying state claims as they pertain to the Mountainside defendants, the municipal defendants, as well as the defendant police

officers. Her motion is based on the alleged failure of the Court to properly apply the "objective reasonableness" standard as well as the alleged oversight of the Court to consider expert testimony and inconsistencies in the evidence which plaintiff claims should preclude summary judgment.

Defendants Bloomfield Volunteer Emergency Squad and the attendants named as individuals ("BVES defendants"), the Mountainside defendants, the municipal defendants, and the police officers specifically request that the Court reconsider its decision to dismiss the pendant state law claims without prejudice.

The Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331.

PROCEDURAL HISTORY

On May 16, 1991, plaintiff, Dr. Barbara Lee Perlmutter, administratrix of decedent Ann Perlmutter, filed a federal civil rights claim and accompanying state law negligence claims against the BVES defendants, Mountainside defendants, municipal defendants, and police officers. (Op. of June 7, 1994, p.3).

On November 18, 1993, this Court granted summary judgment to the BVES defendants. (*Id.*). The plaintiff alleged that defendants conspired to violate plaintiff's civil rights pursuant to 42 U.S.C. 1985. In addition, the plaintiff claimed that defendants breached decedent's constitutional rights pursuant to *Monnell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978). Plaintiff also

asserted several state tort claims against these defendants. (*Id.*) The Court dismissed the federal claims with prejudice; the state claims were dismissed without prejudice to their being reinstituted in a state court.

This Court heard oral arguments on April 11, 1994, pertaining to the Mountainside defendants' motion for summary judgment. The Court reserved decision on that motion.

On May 23, 1994, the Court heard oral arguments from the municipal defendants and police officers. The Court verbally granted these defendants' motion for summary judgment. The Court also stated that a written opinion would follow.

Before the issuance of the written opinion, on June 2, 1994, plaintiff filed a "Motion for Reconsideration and/or Clarification" requesting that the Court dismiss the state negligence claims without prejudice for lack of pendant jurisdiction. (Plaintiff's Brief on June 2, 1994, p.1).

On June 7, 1994, this Court issued two written decisions, the first pertaining to Mountainside defendants, the second to the municipal defendants and police officers.

In the first opinion concerning the Mountainside defendants, this Court granted summary judgment. (Mountainside Op. of June 7, 1994, p.3). The plaintiff alleged the Mountainside defendants conspired to violate plaintiff's civil rights, violating 42 U.S.C. § 1985, and that defendants breached her constitutional rights set forth in *Monnell. See Monnell,* 436 U.S. 658 (1978). (*Id.*). The plaintiff also brought a medical malpractice claim. (*Id.* at 4). As

with the BVES defendants, the federal claims were dismissed with prejudice, the state negligence claims without.

Also on June 7, 1994, this Court dismissed plaintiff's claims against the remaining municipal defendants and police officers. (Police Op. of June 7, 1994, p.17). The plaintiff claimed that the defendants violated the plaintiff's civil rights pursuant to 42 U.S.C. § 1983, and that they conspired to deprive the plaintiff of her civil rights, violating 42 U.S.C. § 1985. (*Id.* at 4). In addition, plaintiff charged defendants with wrongful death claims pursuant to N.J.S.A. 2:15-3, and sued for depriving Dr. Barbara Perlmutter of the support and companionship of her daughter. (*Id.*). As with the other defendants, the federal claims were dismissed with prejudice, the state claims were dismissed without.

On June 9, 1994, plaintiff withdrew the June 2, 1994 motion for reconsideration because her "Motion for Reconsideration and/or Clarification" was "answered" when the June 7, 1994 Opinion was filed. (Plaintiff's Letter to the Court dated June 9, 1994, p.1). Plaintiff has not been prejudiced by this, however, because the Court has entertained her renewed motion.

On June 17, 1994, plaintiff filed a substitution of attorney. Also on June 17, 1994, both plaintiff and defendant police officers filed a motion for reconsideration of the June 7th Opinion. (Plaintiff's letter to the Court dated June 17, 1994, p.1). At this time, the Court granted plaintiff's and defendants' request for supplemental briefing.

On July 15, 27 and 28, 1994, the municipal defendants, BVES defendants and Mountainside defendants, respectively, filed a motion for reconsideration.

ANALYSIS

1. Standards Governing Motions for Reargument

Motions for reargument are governed in this District by General Rule 12I of the United States District Court for the District of New Jersey.[1] General Rule 12I specifies that a motion for reargument must be filed within ten (10) days after an order or judgment has been entered. Lite, *New Jersey Federal Practice Rules*, Comment 8 to Rule 12I at 71. The Court can permit relaxation of this restriction "only in extraordinary circumstances." (*Id* at 72).

A motion for reconsideration must address dispositive factual matters or controlling issues of law which were presented but not considered by the court in the previous ruling. *Public Int. Research Group v. Yates Industries*, 790 F. Supp. 511, 512 (3d Cir. 1991). Thus, matters not raised in the previous ruling may not be introduced on a motion for reargument. In addition, parties may not expand the record on reargument to include matters not originally addressed; all such arguments will be excluded from the court's evaluation of the 12I motion except under unusual circumstances. *See Florham Park Chevron,*

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[1] In most instances, a motion for reargument under General Rule 12I is considered a motion for reconsideration under Fed. R. Civ. P. 59(e). *See e.g., Federal Kemper Ins. Co. v. Rauscher*, 807 F.2d 345, 348 (3d Cir. 1986). Thus, courts frequently use "reargument" and "reconsideration" interchangeably.

Inc. v. Chevron U.S.A., Inc., 680 F. Supp. 159, 162 (D.N.J. 1988) (parties may not expand a record on reargument); *Harsco Corp. v. Zlotnicki*, 779 F.2d 906, 909 (3d Cir. 1985) (acquisition of dispositive evidence unavailable in the previous trial was a valid reason for granting motion for reargument).[2] It is essential that the party seeking reargument show more than simple disagreement with a court's prior ruling. *Florham Park Chevron*, 680 F. Supp. at 163.

2. The Plaintiff's Instant Action

In addition to the motion for reargument, the plaintiff moves to amend the June 7, 1994 orders pursuant to Rule 59(e), and for relief from the Orders pursuant to Rule 60(b). In most instances, a motion for reconsideration under General Rule 12I is considered a motion for reargument under Fed. R. Civ. P. 59(e). Further, there is considerable overlap between Fed. R. Civ. P. 59(e) and 60(b) such that a motion designated as one may be decided under the other. *See Conway v. Johnson*, 115 F.R.D. 603 (N.D. Cal. 1987) (*citing* Moore's Federal Practice P 60.22[2], at 60-138 to 60-139, and 11 C. Wright & A. Miller, *Federal Practice and Procedure*, § 2817, at 110). For these

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[2] In this case, plaintiff has tendered several new, belated expert reports. *See e.g.*, letter from plaintiff's new counsel and reply declaration of David N. Butler dated August 8, 1994. While the Court has considered all briefs submitted on the present motions, it may not and has not considered those untimely expert reports. The Court has also considered plaintiff's supplemental affidavit dated June 16, 1994, and its exhibits. Nothing contained therein raises genuine issues of material fact precluding the summary judgment previously granted.

reasons, this Court will consider those rules as well as the requirements of Local Rule 12I.

The Court has carefully reviewed all papers submitted and determines that no viable basis has been submitted by any party for reconsideration of the opinions and orders previously entered in this matter. No facts, controlling decisions or other matters before the Court when it was considering its prior decisions were overlooked or misapplied. No reason enumerated in Fed. R. Civ. P. 60(b), including the residual category found in subsection 60(b)(6), is presented with sufficient persuasiveness to warrant relief from those orders in any respect. One must keep in mind that this Court focused upon and adjudicated the alleged federal claims only. Not every arguable state-law tort is a civil rights violation. No material legal issues were overlooked or wrongly decided in the prior opinions.

Finally, as to the motions of the defendants for reconsideration, this Court remains convinced that its determination not to exercise supplemental jurisdiction over state law claims is correct. (*See* 28 U.S.C. 1367 (c) and the discussion in the June 7, 1994 opinion pertaining to the municipal and police officer defendants at 16-17). Whether any of the Court's rulings in the case at bar will support either claim or issue preclusion arguments in a subsequent state proceeding is a matter to be addressed in that court.

An order denying all motions for reconsideration of the Court's prior opinions and orders is enclosed.

/s/ John W. Bissell
JOHN W. BISSELL, U.S.D.J.

DATED: August 23, 1994

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

DR. BARBARA LEE PERLMUTTER, et al., Plaintiff, v. MICHAEL COOPER, et al., Defendants.	Hon. John W. Bissell Civil Action No. 91-2140 **ORDER** (Filed Aug. 23, 1994)

This matter having been brought before the Court upon the application of plaintiff Dr. Barbara Lee Perlmutter and defendants for reconsideration of this Court's prior opinions and orders dismissing the within action; and the Court having considered the papers submitted hereon; and for reasons set forth in this Court's opinion of even date;

IT IS ON THIS 23d day of August, 1994;

ORDERED that plaintiff Dr. Barbara Lee Perlmutter's and defendants' motions for reconsideration be and the same are hereby denied in their entirety.

/s/ John W. Bissell
JOHN W. BISSELL U.S.D.J.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 94-5579

DR. BARBARA LEE PERLMUTTER, General Administratrix and Administratrix ad Prosequendum of the Estate of Ann Perlmutter, and DR. BARBARA LEE PERLMUTTER, Individually,

Appellant

v.

MICHAEL COOPER, Individually and as Police Officer of the Bloomfield Police Department; ROBERT HOCHSTUHL, Individually and as a Police Officer of the Bloomfield Police Department; PTL. PRIOLO, Individually and as a Police Officer of the Bloomfield Police Department; JOHN DOE, Individually and as a Police Officer of the Bloomfield Police Department; SGT. BEHRE, Individually and as a Police Officer of the Bloomfield Police Department; JOHN MCNIFF, Individually and as Chief of Police of the Bloomfield Police Department; THE POLICE DEPARTMENT OF THE TOWNSHIP OF BLOOMFIELD; THE TOWNSHIP OF BLOOMFIELD; F. MENZEL, Individually and as Captain of the Bloomfield Volunteer Emergency Squad; A. DEPCZEK, Individually and as attendant of the Bloomfield Volunteer Emergency Squad; JOHN DOE II, Individually and as attendant of the Bloomfield Volunteer Emergency Squad; BLOOMFIELD VOLUNTEER EMERGENCY SQUAD; AMBULANCE ATTENDANT DAVIS, Individually and as attendant of the Mountainside Hospital Mobil Intensive Care Unit (MICU aka Med VII): DAN MACMAHON, Individually and as attendant of the Mountainside Hospital Mobile Intensive Care Unit (MICU aka MED

VII); JOHN DOE III, Individually and as attendant of the Mountainside Hospital Mobile Intensive Care Unit (MICU aka Med VII); MOUNTAINSIDE HOSPITAL
(Caption amended per the Clerk's 10-21-94 order)

SUR PETITION FOR REHEARING

BEFORE: SLOVITER, *Chief Judge*, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, MC KEE, SAROKIN and ALDISERT*, *Circuit Judges*

The petition for rehearing filed by appellant having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ Robert E. Cowen
Circuit Judge

Dated: July 12, 1995

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* As to panel rehearing.

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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
CIVIL ACTION NO: 91-2140 (JWB)

HONORABLE

Plaintiffs, DR. BARBARA LEE PERLMUTTER, General Administratrix and Administratrix ad Prosequendum of the Estate of Ann Perlmutter; and DR. BARBARA LEE PERLMUTTER, Individually v. Defendants, MICHAEL COOPER, Individually and as a Police Officer of the Bloomfield Police Department; ROBERT HOCHSTUL, Individually and as a Police Officer of the Bloomfield Police Department; PTL. PRIOLO, Individually and as a Police Officer of the Bloomfield Police Department; PTL. ZELINSKY, Individually and as a Police Officer of the Bloomfield Police Department; JOHN DOE,	COMPLAINT AND DEMAND FOR TRIAL BY JURY (Filed May 16, 1991)

Individually and as a Police :
Officer of the Bloomfield Police :
Department; SGT. BEHRE, :
Individually and as a Police :
Officer of the Bloomfield Police :
Department; JOHN MC NIFF, :
Individually and as Chief of Police :
of the Bloomfield Police :
Department; THE POLICE :
DEPARTMENT OF THE :
TOWNSHIP OF BLOOMFIELD; :
THE TOWNSHIP OF :
BLOOMFIELD; F. MENZEL, :
Individually and as Captain of the :
Bloomfield Volunteer Emergency :
Squad; A. DEPCZEK, Individually :
and as and as [sic] attendant of the :
Bloomfield Volunteer Emergency :
Squad; JOHN DOE II, Individually :
and as attendant of the Bloomfield :
Volunteer Emergency Squad; :
Ambulance Attendant DAVIS, :
Individually and as attendant of :
the Mountainside Hospital Mobile :
Intensive Care Unit (MICU aka :
Med VII); DAN MAC MAHON, :
Individually and as attendant of :
the Moutainside Hospital Mobile :
Intensive Care Unit (MICU aka :
Med VII); JOHN DOE III, :
Individually and as attendant of :
the Mountainside Hospital Mobile :
Intensive Care Unit (MICU aka :
Med VII); and MOUNTAINSIDE :
HOSPITAL :
.....:

Plaintiff Dr. Barbara Lee Perlmutter, residing at 52 Salter Place, in the Township of Maplewood, County of Essex, and State of New Jersey, General Administratrix and Administratrix ad Prosequendum of the Estate of Ann Perlmutter, deceased, and Dr. Barbara Lee Perlmutter, Individually, complaining of the above named defendants says:

JURISDICTION

1. This action is brought pursuant to 42 U.S.C. §§ 1981, 1983, 1985, 1985 [sic], 1988 and the First, Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Jurisdiction is founded upon 28 U.S.C. §§ 1331, 1343 and 1346(b) to recover damages for violations of plaintiff's civil rights. The amount in controversy exceeds $10,000.00 excluding interest and costs.

Plaintiff further invokes the pendent jurisdiction of the Court to consider claims arising under state law.

PARTIES

2. Plaintiff Dr. Barbara Perlmutter is and was at all times described in this Complaint a citizen of the United States and a resident of the Township of Maplewood, County of Essex and State of New Jersey.

3. Plaintiff Dr. Barbara Lee Perlmutter is the mother of decedent Ann Perlmutter and is the General Administratrix and Administratrix ad Prosequendum of the Estate of Ann Perlmutter.

4. Defendant Police Officer Michael Cooper is and was at all times relevant hereto an Officer of the Police Department of the Township of Bloomfield acting in such capacity as the agent, servant and employee of the defendant Township of Bloomfield. He is sued individually and in his official capacity.

5. Defendant Police Officer Priolo is and was at all times relevant hereto an Officer of the Police Department of the Township of Bloomfield acting in such capacity as the agent, servant and employee of the defendant Township of Bloomfield. He is sued individually and in his official capacity.

6. Defendant Police Officer Zelinsky is and was at all times relevant hereto an Officer of the Police Department of the Township of Bloomfield acting in such capacity as the agent, servant and employee of the defendant Township of Bloomfield. He is sued individually and in his official capacity.

7. Defendant Police Officer Robert Hochstuhl is and was at all times relevant hereto an Officer of the Police Department of the Township of Bloomfield acting in such capacity as the agent, servant and employee of the defendant Township of Bloomfield. He is sued individually and in his official capacity.

8. Defendant Sgt. Behre is and was at all times relevant hereto an Officer of the Police Department of the Township of Bloomfield acting in such capacity as the agent, servant and employee of the defendant township of Bloomfield. He is sued individually and in his official capacity.

9. Defendant John Doe, whose identity is as yet unknown to plaintiff, is and was at all times relevant hereto an Officer of the Police Department of the Township of Bloomfield acting in such capacity as the agent, servant and employee of the defendant Township of Bloomfield. He is sued individually and in his official capacity.

10. Defendant John McNiff is and was at all relevant times Chief of Police of the Bloomfield Police Department acting in such capacity as the agent, servant and employee of the defendant Township of Bloomfield. As such he was the Commanding Officer of defendant Police Officers Michael Cooper, Priolo, Zelinsky, Hochstuhl, John Doe and Sgt. Behre and was responsible for the training and conduct of said defendants. He is also responsible by law for enforcing the regulations of the Bloomfield Police Department and for ensuring that Bloomfield Police Officers obey the laws of the State of New Jersey and the United States. He is sued individually and in his official capacity.

11. At all times relevant hereto and in all their actions described herein, the defendants Cooper, Priolo, Zelinsky, Hochstuhl, Doe, Behre and McNiff were acting under color of law and under color of their authority as Police Officers and Police Chief of the Township of Bloomfield.

12. The defendant Township of Bloomfield is a municipal corporation within the State of New Jersey and at all times relevant hereto employed the defendants Cooper, Priolo, Zelinsky, Hochstuhl, Doe and Behre as police officers and defendant McNiff as police chief.

13. Defendants Police Department of the Township of Bloomfield is a governmental entity of the County of Essex, State of New Jersey and at all times relevant hereto it employed the aforementioned defendants.

14. F. Menzel is and was at all times relevant hereto a captain of the Bloomfield Volunteer Emergency Squad acting in such capacity as the agent, servant and employee of the defendant Township of Bloomfield. He is sued individually and in his official capacity.

15. A. Depczek is and was an attendant of the Bloomfield Volunteer Emergency Squad and was acting in such capacity as the agent, servant and employee of the defendant Township of Bloomfield. He is sued individually and in his official capacity.

16. Defendant John Doe II whose identity is as yet unknown to plaintiff is and was an attendant of the Bloomfield Volunteer Emergency Squad and was acting in such capacity as the agent, servant and employee of the defendant Township of Bloomfield. He is sued individually and in his official capacity.

17. Defendant Ambulance Attendant Davis is and was an attendant of the Mountainside Hospital Mobile Intensive Care Unit (MICU aka Med VII) and was acting in such capacity as the agent, servant, and employee of the Mountainside Hospital. He is sued individually and in his official capacity.

18. Defendant Ambulance Attendant Dan MacMahon is and was an attendant of the Mountainside Hospital Mobile Intensive Care Unit (MICU aka Med VII) and was acting in such capacity as the agent, servant and

employee of the Mountainside Hospital. He is sued individually and in his official capacity.

19. Defendant Ambulance Attendant John Doe III whose identity is as yet unknown to plaintiff is and was an attendant of the Mountainside Hospital Mobile Intensive Care Unit (MICU aka Med VII) and was acting in such capacity as the agent, servant and employee of the Mountainside Hospital. He is sued individually and in his official capacity.

20. Defendant Mountainside Hospital is a private, non profit hospital located at Bay and Highland Avenues in Montclair, New Jersey and as such is responsible for the actions of the Mountainside Hospital Mobile Intensive Care Unit and its agents, servants and employees.

FIRST COUNT

1. On or about May 20, 1989, defendants Cooper, Hochstuhl, Priolo, Zelinsky, Doe and Behre, all members of defendant Bloomfield Police Department, responded to the address of decedent located at 165 Franklin Avenue in Bloomfield, New Jersey.

2. Upon their arrival, the defendant police officers found the decedent on the floor of a fellow tenant's basement apartment, and in obvious need of medical attention.

3. The decedent had various lacerations on and about her hands and body. She was bleeding profusely as a result of her various injuries.

4. The defendant police officers responded to the decedent's obvious need of immediate medical attention

by cuffing the decedent's hands behind her back and tying her legs together with a bedsheet.

5. When the decedent was completely immobilized, the defendant police officers threw the decedent upon a stretcher, with her face down and her hands and feet bound behind her. The defendants then tied the decedent to the stretcher face down and had her transported to Clara Maass Medical Center where she died on May 26, 1989.

6. The decedent's respiration was severely restricted as a result of her being held face down with her face buried into the stretcher and her hands and feet bound behind her.

7. The defendant police officers' use of unreasonable and unnecessary force in restraining the decedent was a direct and proximate cause of her death.

7.1 The defendant police officers' actions, conducted either knowingly, intentionally, maliciously, or with reckless disregard or negligently, deprived the decedent, Ann Perlmutter, of her civil rights.

7.2 Defendant police officers' actions were committed under the color of authority as Bloomfield Police Officers, and were entirely unjustified by the actions of the decedent, Ann Perlmutter.

7.3 The decedent, Ann Perlmutter, has been denied the right to be free from physical violence and abuse, and to be free from the use of excessive and unreasonable force against her person.

8. The defendant police officers were negligent in failing to adequately and properly exercise appropriate

arrest and restraint procedures and failing to conform to appropriate standards and procedures regarding detainment.

9. As a direct and proximate result of the negligent conduct of the defendant police officers, the decedent was caused to suffer severe and painful bodily injuries, causing her great pain and suffering and resulting in her death.

10. Plaintiff Dr. Barbara Lee Perlmutter was appointed Administratrix ad Prosequendum of the estate of Ann Perlmutter, deceased, by the Surrogate of the County of Essex, State of New Jersey.

11. The estate of the decedent was liable for hospital, medical, funeral and burial expenses and charges for the decedent.

12. The decedent, Ann Perlmutter, left surviving her mother, Plaintiff Dr. Barbara Lee Perlmutter. At the time of her demise and by reason of the wrongful death of the decedent, Plaintiff Dr. Barbara Lee Perlmutter has suffered loss of the companionship and emotional support of the decedent.

13. There is, and at the time of the negligence hereinafter set forth, there was, in force and effect in the State of New Jersey, a Death Statute known and designated as N.J.S.A. 2A:31-1 through 6. Plaintiff brings this action pursuant to provisions thereof for the benefit of the next of kin of decedent.

14. A Notice of Intent to File a Claim was filed on behalf of the plaintiff on August 20, 1989.

14.1 More than six (6) months have passed since the filing of the Notice of Intent to File a Claim, and plaintiffs' claims remain unsatisfied.

14.2 This action is commenced within two (2) years after the happenings of the death of the decedent.

WHEREFORE, Plaintiffs, Dr. Barbara Lee Perlmutter, General Administratrix and Administratix ad Prosequendum of the Estate of Ann Perlmutter, and Dr. Barbara Lee Perlmutter, individually demand judgment against the defendant Police Officers Cooper, Hochstuhl, Priolo, Zelinsky, Doe and Behre, individually and as Police Officers of the defendant Bloomfield Police Department, jointly and severally, for compensatory and punitive damages, together with interest, costs of suit and attorney's fees.

SECOND COUNT

1. Plaintiffs repeat each and every allegation contained in the First Count of the Complaint as though fully set forth at length herein.

2. As a result of the negligence of the defendant Police Officers Cooper, Hochstuhl, Priolo, Zelinsky, Doe and Behre, individually and in the course of their employment with defendant Bloomfield Police Department, plaintiffs' decedent suffered great pain and suffering.

3. There is, and at the time of the negligence hereinafter set forth, there was in force and effect in the State

of New Jersey a Survival Action Statute known and designated as N.J.S.A. 2:15-3 and plaintiffs bring this action pursuant to provisions thereof.

WHEREFORE, Plaintiffs Dr. Barbara Lee Perlmutter, General Administratrix and Administratrix ad Prosequendum of the Estate of Ann Perlmutter, and Dr. Barbara Lee Perlmutter, individually demand judgment against the defendant Police Officers Cooper, Hochstuhl, Priolo, Zelinsky, Doe and Behre individually and as Police Officers of defendant Bloomfield Police Department, jointly and severally, for compensatory and punitive damages, together with interest, costs of suit and attorney's fees.

THIRD COUNT

1. Plaintiffs repeat each and every allegation contained in the First and Second Counts of the Complaint as set forth at length herein and makes them a part thereof.

2. Plaintiff Dr. Barbara Lee Perlmutter is the mother of decedent Ann Perlmutter. As a result of the negligence of the defendant Police Officers Cooper, Hochstuhl, Priolo, Zelinsky, Doe and Behre individually and as Police Officers of defendant Bloomfield Police Department, plaintiff has been deprived of the pecuniary support and companionship of her daughter, Ann Perlmutter.

WHEREFORE, Plaintiff Dr. Barbara Lee Perlmutter demands judgment against the defendants, jointly and severally for compensatory and punitive damages, together with interest, costs of suit and attorney's fees.

FOURTH COUNT

1. Plaintiffs repeat each and every allegation contained in the First, Second and Third Counts of this Complaint as if set forth at length herein and makes them a part thereof.

2. The actions taken by the defendant police officers were in direct violation of 42 U.S.C. § 1983, depriving the decedent Ann Perlmutter of the following rights, privileges and immunities secured to her by the constitution of the United States:

a) The right to be free from cruel and unusual punishment, secured by the Eighth and Fourteenth Amendments to the Constitution of the United States.

b) The right not to be deprived of life, liberty, or property without due process of law secured under the Fifth and Fourteenth Amendments to the Constitution of the United States.

3. The acts, conduct and behavior of the defendant police officers were performed either knowingly, intentionally or maliciously by reason of which the plaintiffs are entitled to an award of punitive damages.

4. At all times herein mentioned, the defendants were acting under color of state law.

5. As a direct and proximate result of the defendant police officers actions, the decedent Ann Perlmutter suffered severe and painful bodily injuries, causing her great pain and suffering and resulting in her death.

WHEREFORE, Plaintiffs Dr. Barbara Lee Perlmutter, General Administratrix and Administratrix ad Prosequendum of the Estate of Ann Perlmutter, and Dr. Barbara Lee Perlmutter individually, demand judgment against the defendants jointly and severally for compensatory and punitive damages, together with interest, costs of suit and attorney's fees, pursuant to the provisions of 42 U.S.C. § 1988.

FIFTH COUNT

1. Plaintiffs repeat each and every allegation contained in the First through Fourth Counts in this Complaint as set forth at length herein and makes them a part thereof.

2. The use of unreasonable and unnecessary force against the decedent Ann Perlmutter constituted an overt act in furtherance of a conspiracy between the defendants to deprive the decedent of her civil rights.

3. The said conspiracy and the acts in furtherance thereof were in direct violation of 42 U.S.C. § 1985, depriving the decedent Ann Perlmutter of her rights privileges and immunities secured to her by the Constitution of the United States under the provisions of the Fifth, Eighth and Fourteenth Amendments.

4. The acts, conduct and behavior of the defendants were performed by them knowingly, intentionally and maliciously, by reason of which the plaintiffs are entitled to an award of punitive damages.

WHEREFORE, Plaintiffs Dr. Barbara Lee Perlmutter, General Administratrix and Administratrix ad Prosequendum of the Estate of Ann Perlmutter and Dr. Barbara Lee Perlmutter individually, demand judgment against the defendants, jointly and severally, for compensatory and punitive damages, together with interest, costs of suit, and attorney's fees, pursuant to the provisions of 42 U.S.C. § 1988.

SIXTH COUNT

1. Plaintiffs repeat each and every allegation contained in the First through Fifth Counts of this Complaint as if set forth at length herein and makes them a part thereof.

1. Plaintiffs repeat each and every allegation contained in the First through Fifth Counts of this Complaint as if set 1 forth at length herein and makes them a part thereof. [sic – duplication of paragraph in original]

2. Defendant John McNiff, as the Chief of Police of the Bloomfield Police Department, was in a position of authority to prevent or attempt to prevent the previously mentioned negligent, unlawful, and conspiratory conduct of the defendant police officers, who were all subordinate police officers under his direction.

3. Defendant McNiff failed to properly train and supervise his subordinate defendant police officers as to the proper procedures and proper use of force in effecting an arrest.

4. The failure of the defendant John McNiff to prevent or attempt to prevent the negligent, unlawful and

conspiratory conduct of his subordinate defendant police officers named herein, when he knew or reasonably should have known of said negligent, unlawful and conspiratory conduct, was in direct violation of 42 U.S.C. § 1985 and 42 U.S.C. § 1983 and deprived the decedent Ann Perlmutter of her aforesaid civil rights, privileges, and immunities secured to her under the Constitution of the United States under the provisions of the Fourth, Fifth, Eighth and Fourteenth Amendments.

WHEREFORE, Plaintiffs Dr. Barbara Lee Perlmutter, General Administratrix and Administratrix ad Prosequendum of the Estate of Ann Perlmutter and Dr. Barbara Lee Perlmutter, individually, demand judgment against the defendants, jointly and severally for compensatory and punitive damages, together with interest costs of suit, and attorney's fees, pursuant to the provisions of 42 U.S.C. § 1988.

SEVENTH COUNT

1. Plaintiffs repeat each and every allegation contained in the First through Sixth Counts of this Complaint as though set forth at length herein.

2. At all relevant times mentioned herein, defendant police officers Cooper, Hochstuhl, Priolo, Zelinsky, Doe and Behre, were employed by the defendant Bloomfield Police Department, and were each acting under the direction and control of defendant John McNiff, Chief of the defendant Bloomfield Police Department, and as the agents, servants, and/or employees of the defendant Bloomfield Police Department and the defendant Township of Bloomfield.

3. Defendants McNiff, Bloomfield Police Department, and Township of Bloomfield negligently failed to instruct, supervise, control, train and discipline on a continuing basis subordinate police officers under their direction and control to refrain from acting in a negligent, unlawful and conspiratory manner and from the use of unreasonable and excessive force.

4. Defendants McNiff, Bloomfield Police Department, and Township of Bloomfield should have had knowledge that the wrongs done or conspired to be done by said police officers, as previously set forth would result from the failure to properly train, instruct and supervise the defendant police officers.

5. Defendants McNiff, Bloomfield Police Department, and Township of Bloomfield had the authority and power to prevent or to aid in preventing the commission of the wrongs done to the decedent Ann Perlmutter and could have done so by the exercise of reasonable diligence, but they failed, neglected or refused to do so.

6. As a direct and proximate result of the negligent and intentional acts of defendants McNiff, Bloomfield Police Department and Township of Bloomfield, the decedent Ann Perlmutter suffered severe and painful bodily injuries, causing her great pain and suffering and resulting in her death.

WHEREFORE, Plaintiffs Dr. Barbara Lee Perlmutter, General Administratrix and Administratrix ad Prosequendum, and Dr. Barbara Lee Perlmutter, individually, demand judgment against defendants John McNiff,

Bloomfield Police Department and Township of Bloomfield, jointly and severally, for compensatory damages, together with interest and costs of suit.

EIGHTH COUNT

1. Plaintiffs repeat and reallege each and every allegation contained in the First through Seventh Counts of this Complaint as though fully set forth at length herein.

2. On or about May 20, 1989, defendants Menzel, Depczek and Doe II, all members of defendant Bloomfield Volunteer Emergency Squad, responded to the address of the decedent located at 165 Franklin Avenue in Bloomfield, New Jersey.

3. Upon their arrival, defendants Menzel, Depczek and Doe II found the decedent in obvious need of immediate medical attention.

4. Defendants Menzel, Depczek and Doe II individually and as attendants of defendant Bloomfield Volunteer Emergency Squad, did not employ the care and skill ordinarily used by emergency squad attendants, but rather were so unskillful, careless and negligent as to improperly treat and care for plaintiffs' decedent.

5. Defendants Menzel, Depczek and Doe II were grossly negligent in failing to adequately and properly exercise appropriate medical treatment procedure and failing to conform with proper standards and procedures regarding the treatment and handling of emergency medical patients.

6. Defendants Menzel's, Depczek's and Doe II's actions were conducted either knowingly, intentionally,

maliciously or with reckless disregard for the decedent's well being.

7. As a direct and proximate result of the grossly negligent conduct of defendants Menzel, Depczek and Doe II, the decedent was caused to suffer severe pain and bodily injuries, causing her great pain and suffering and resulting in her death.

WHEREFORE, Plaintiffs Dr. Barbara Lee Perlmutter, General Administratrix and Administratrix ad Prosequendum of the Estate of Ann Perlmutter and Dr. Barbara Lee Perlmutter, individually, demand judgment against the defendants jointly and severally, for compensatory and punitive damages, together with interest, costs of suit, and attorney's fees.

NINTH COUNT

1. Plaintiffs repeat and reallege each and every allegation contained in the First through Eighth Counts of this Complaint as though fully set forth at length herein.

2. On or about May 20, 1989, defendants McMahon [sic], Davis and Doe III, all members of the Mountainside Hospital Mobile Intensive Care Unit, responded to the address of the decedent located at 165 Franklin Avenue in Bloomfield, New Jersey.

3. Upon their arrival, defendants MacMahon, Davis and Doe III found the decedent in.obvious. need of medical attention.

4. Defendants MacMahon, Davis and Doe III individually and as attendants of the Mountainside Hospital Mobile Intensive Care Unit, did not employ the care and

skill ordinarily used by Mobile Intensive Care Unit attendants, but rather were so unskillfull, careless and negligent as to improperly treat and care for plaintiffs' decedent.

5. Defendants MacMahon, Davis and Doe III were grossly negligent in failing to adequately and properly exercise appropriate medical treatment procedure and failing to conform with proper standards and procedures regarding the treatment and handling of emergency medical patients.

6. Defendants MacMahon's, Davis' and Doe III's actions were conducted either knowingly, intentionally, maliciously or with a reckless regard for the decedent's well being.

7. As a direct and proximate result of the grossly negligent conduct of defendants MacMahon, Davis and Doe III, the decedent was caused to suffer severe pain and bodily injuries, causing her great pain and suffering and resulting in her death.

WHEREFORE, Plaintiffs Dr. Barbara Lee Perlmutter, General Administratrix and Administratrix ad Prosequendum of the Estate of Ann Perlmutter and Dr. Barbara Lee Perlmutter, individually, demand judgment against the defendants jointly and severally for compensatory and punitive damages together with interest, costs of suit and attorney's fees.

TENTH COUNT

1. Plaintiffs repeat each and every allegation contained in the First through Ninth Counts this complaint as though fully set forth at length herein.

2. At all relevant times mentioned herein, defendants Menzel, Depczek and Doe II were employed by the defendant Bloomfield Volunteer Emergency Squad and were each acting under the direction and control of defendants Bloomfield Volunteer Emergency Squad, Bloomfield Police Department and the Township of Bloomfield, as their agents, servants and/or employees.

3. Defendants Bloomfield Volunteer Emergency Squad, Bloomfield Police Department and the Township of Bloomfield negligently failed to instruct, supervise, control, and discipline on a continuing basis its subordinates, defendants Menzel, Depczek and Doe II, who were under their direction and control to refrain from acting in a grossly negligent manner.

4. Defendants Bloomfield Volunteer Emergency Squad, Bloomfield Police Department and the Township of Bloomfield had the authority and power to prevent or to aid in preventing the commission of the wrongs done to the decedent Ann Perlmutter and could have done so by the exercise of reasonable diligence, but they failed, negligently or refused to do so.

5. Defendants Bloomfield Volunteer Emergency Squad, Bloomfield Police Department and the Township

of Bloomfield directly or indirectly approved the negligent, unlawful, deliberate, malicious, reckless and wanton conduct of their subordinates, defendants Menzel, Depczek and Doe II, as previously described above.

6. As a direct and proximate result of the negligent and/or intentional acts of defendants Bloomfield Volunteer Emergency Squad, Bloomfield Police Department and Township of Bloomfield, the deceased Ann Perlmutter suffered severe and painful bodily injuries causing her great pain and suffering and resulting in her death.

WHEREFORE, Plaintiffs Dr. Barbara Lee Perlmutter, General Administratrix and Administratrix ad Prosequendum and Dr. Barbara Lee Perlmutter, individually, demand judgment against defendants jointly and severally, for compensatory and punitive damages, together with interest, costs of suit and attorney's fees.

ELEVENTH COUNT

1. Plaintiffs repeat each and every allegation contained in the First through Tenth Counts of this Complaint as though fully set forth at length herein.

2. At all relevant times mentioned herein, defendants MacMahon, Davis and Doe III were employed by the defendant Mountainside Hospital and were each acting under the direction and control of defendant Mountainside Hospital, Bloomfield Police Department and the Township of Bloomfield as their agents, servants and/or employees.

3. Defendants Mountainside Hospital, Bloomfield Police Department and the Township of Bloomfield negligently failed to instruct, supervise, control, and discipline on a continuing basis its subordinates, defendants MacMahon, Davis and Doe III who were under their direction and control to refrain from acting in a grossly negligent manner.

4. Defendants Mountainside Hospital, Bloomfield Police Department and the Township of Bloomfield had the authority and power to prevent or to aid in preventing the commission of the wrongs done to the decedent Ann Perlmutter and could have done so by the exercise of reasonable diligence, but they failed, neglected or refused to do so.

5. Defendants Mountainside Hospital, Bloomfield Police Department and the Township of Bloomfield directly or indirectly approved the negligent, unlawful, deliberate, malicious, reckless and wanton conduct of their subordinates, defendants MacMahon, Davis and Doe III as previously described above.

6. As a direct and proximate result of the negligent and/or intentional acts of defendants Mountainside Hospital, Bloomfield Police Department and the Township of Bloomfield, the deceased Ann Perlmutter suffered severe and painful bodily injuries, causing her great pain and suffering and resulting in her death.

WHEREFORE, Plaintiffs, Dr. Barbara Lee Perlmutter, General Administratrix and Administratrix ad prosequendum, and Dr. Barbara Lee Perlmutter, individually,

demand judgment against defendants jointly and severally for compensatory and punitive damages, together with interest, costs of sut [sic] and attorney's fees.

JURY DEMAND

Plaintiffs in the above matter demand a trial by jury of all issues so triable in this matter under the provisions of R:38B of the Federal Rules of Civil Procedure.

NOTO & CUBA
Attorneys for Plaintiffs

By /s/ Brenda A. Cuba
Brenda A. Cuba

By /s/ Maria DelGaizo Noto
Maria DelGaizo Noto

Dated: May 15, 1991

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
CIVIL ACTION NO. 91-2140 (JWB)

DR. BARBARA LEE PERLMUTTER, et al Plaintiffs, vs MICHAEL COOPER, et al. Defendants.	)	**DECLARATION OF CLARK E. ALPERT IN SUPPORT OF MOTION FOR RECONSIDERATION**

I, CLARK E. ALPERT, of full age, hereby declare as follows:

1. I am the principal of Alpert & Raice, P.C., newly substituted attorneys for the plaintiff.

2. On June 15, 1994 I spoke to the medical expert appearing in this matter on behalf of the plaintiffs, Dr. Bennet Derby. Dr. Derby confirmed to me that he had told my predecessor, Maria Noto, Esq., some time ago, that whether or not the decedent had been literally "face down" in the sense of physical impeding her nasal or mouth breathing passages, that would not have changed his opinion that the constriction of Ms. Perlmutter's breathing by virtue of the numerous restraints applied here – restraints which he (unprompted by me) classified as "brutal" – prevented Ms. Perlmutter from breathing, and caused her death. He also said that he thought that information had been made a part of the case (yet I do not see it in the motion papers). He further indicated to me that after this "brutal" constriction took place (by which she could not breathe), any movements that would

have been seen would have been consistent with struggles by the decedent to try to breathe; and furthermore, that the most elementary steps (and, to classify in "lay" terms, the steps one would take out of common decency) – particularly after imposing such a severe constriction of the ability to breathe – would be, at minimum, the following steps *not taken here*:

(a) Constant observation of the decedent's face-particularly since the normal movements of the chest (or lack thereof) could not be visualized with the patient "upside down".

(b) Monitor the pulse every 30 seconds.

(c) Constant checking if the patient is still breathing. Specifically, in order to be able to see if breathing is occurring, which is crucial, the technician has to stay right next to, attempt to talk to, and look in the face of, the victim on the stretcher **at all times.**

(d) Constant review of tissue color to determine if cyanosis has begun, which would again be another indication that breathing is not taking place.

3. Dr. Derby will also testify that the severe, "brutal" constriction, coupled with the extraordinary deviations – from basic medical/emergency care known to every one of the persons present – caused Ms. Perlmutter to be unable to breathe for a number of minutes and led to her "negative" vital signs by the time she was visualized in the ambulance.

4. Dr. Derby will also testify that the way the victim had her hands and legs tied behind her back was a *per se*

risk to life (again, an unprompted statement by Dr. Derby).

5. My predecessor's (Ms. Noto's) file was not delivered to us until yesterday. (Some of the file was made available by my client for review last week.) The Substitution of Attorney was also not signed until yesterday. I have been unable to reach one of the plaintiff's experts or to substantively confer with another. I have not been able to complete my review of the file.

I hereby declare under penalty of perjury that the foregoing statements are true.

/s/ Clark E. Alpert
CLARK E. ALPERT

Dated: June 16, 1994

ALPERT & RAICE, P.C.
449 Mt. Pleasant Avenue
West Orange, New Jersey 07068
(201) 325-1188
Attorneys for Plaintiff

DR. BARBARA LEE PERLMUTTER, General Administratrix ad Prosequendum of the Estate of Ann Perlmutter; and DR. BARBARA LEE PERLMUTTER, Individually, Plaintiff(s), vs. MICHAEL COOPER, *et al.* Defendant(s),	UNITED STATES DISTRICT COURT DISTRICT OF NEW JERSEY DOCKET NO. 91-2140 (JWB) Civil Action **AFFIDAVIT IN SUPPORT OF MOTION FOR RECONSIDERATION** (Filed July 21, 1994)

I, CLARK E. ALPERT, of full age, being duly sworn upon my oath, hereby depose and say:

1. On July 20, 1994, our law enforcement expert, Robert diGrazia, conveyed to me an oral report representing testimony he indicated he is prepared to give, and indicated that he would be able to prepare a more formal report within the next couple of weeks.

2. Mr. diGrazia's oral report to me was a response to my memo to him earlier today, a copy of which is annexed hereto as Exhibit A. Mr. diGrazia indicated that he would separately respond to each question, in time,

and that he was providing me an oral report regarding Exhibit A as a form of summary of his conclusions.

3. Mr. diGrazia's oral report was as follows:

a. Assuming the truth of the "flailing" and "thrashing" by the victim, and assuming restraint of the victim was needed to protect the police officers from a person that victim's size, the use of handcuffs and even tying the legs could potentially be justified. However, none of what was done thereafter was justified or objectively reasonable, and the remainder definitely constituted the improper use of excessive force.

b. The testimony is that the police initiated the process of strapping her into the reeves stretcher. This was not a proper role for the police department. In other words, this was objectively unreasonable, and an intrusion into an improper area. Their role, certainly when she was handcuffed and her legs tied, was only to keep her safe until medical personnel could evaluate the situation and determine what could and should be done to protect the victim. Use of the reeves was purely a medical decision which should have awaited medical personnel, and should have been in their sole decision; and under these facts, there's no reason why, once she was handcuffed and her legs tied together, the police could not have waited for the medical personnel to make the decision. In sum, the police improperly intruded into this entire area that they should not have intruded into, and thus went far overboard to protect themselves or supposedly to protect the victim.

c. Mr. diGrazia will testify that there was no justification for so many and such oppressive restraints.

Thus, even if *arguendo* it was the police's function to determine whether to tie her to the stretcher at all, they 'overdid' it by a wide margin based on any objectively reasonable standard.

d. Assuming *arguendo* the police had any role in making the determination as to how to place the victim on the reeves (the evidence reflects that they assumed such a role here improperly, and should not have had any role), the victim should have been placed on her **side** (or on her back) on the stretcher, definitely not prone (regardless of whether her face was 'buried' or not); this is basic police training.

4. Mr. diGrazia will also testify that in circumstances such as these, the police may tend to be influenced in their treatment of someone with a 'record', even a victim, by the belief that 'once a criminal, always a criminal'; and that if the police really did perceive the victim as an African American, that could also have influenced their treatment of her. The facts here are consistent with these influences, but absolute certainty is impossible because that involves knowing what the officers were actually thinking.

5. Mr. diGrazia specifically reviewed the foregoing paragraphs of this affidavit and approved them as accurately constituting his oral report.

6. On July 20, 1994, I also spoke to our medical expert, Dr. Bennett Derby, who also reaffirmed the entirety of his oral report as communicated to me and reflected in my Declaration dated June 16, 1994; and further rendered the following supplemental report:

(a) There was no need or logic in strapping in the decedent in the way it was done, in order to transport her. Assuming *arguendo* the need to strap her in at all, first of all it was foreseeably life-threatening to strap her in a prone position. She could and should have been strapped-in on her side or on her back, with the handcuffs transferred to the front of her if necessary, and would have been perfectly transportable in that 'set-up'.

(b) In order to transport her, there was no need to constrict her chest. "Breathing is paramount." The **bottom** two straps on either or both stretchers could have been fastened around both her legs and buttocks area without any risk to her health.

(c) Assuming the alleged "thrashing" and "flailing" was occurring, then once her hands were handcuffed and her feet tied, there was no reason that at least some medical examination could not have taken place at the scene to determine what was appropriate to do 'next' on a **medical** basis, rather than the police simply deciding for their reasons to constrict her to the 'maximum' in the way that proved fatal.

7. Annexed hereto as Exhibit B is a true copy of applicable excerpts from and attachments to Mountainside Hospital's (*et al.*) Answers to Interrogatories.

/s/ Clark E Alpert
CLARK E. ALPERT

Sworn and subscribed by
me on this ___ day of
July, 1994.

/s/ Charlene L. Lundy
Notary Public of New Jersey

CHARLENE L. LUNDY
Notary Public of New Jersey
My Commission Expires May 8, 1997

[Exhibits Omitted In Printing]

(2)

Supreme Court, U.S.
FILED
DEC 11 1995
CLERK

No. 95-579

In The

Supreme Court of the United States

October Term, 1995

DR. BARBARA LEE PERLMUTTER, *et al.*,

Petitioners,

vs.

MICHAEL COOPER, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Should this Court grant Petitioner's writ of certiorari to determine whether the District Court of New Jersey properly held and the United States Court of Appeals for the Third Circuit properly affirmed that the plaintiff presented no evidence of invidious discriminatory animus behind the actions of the private parties involved and thereby properly dismissed Petitioner's 42 U.S.C. § 1985 claim against Respondents Mountainside Hospital and Ambulance Attendants Davis and Dan MacMahon (hereinafter the MICU defendants)?

2. Should this Court grant Petitioner's writ of certiorari to determine whether the District Court of New Jersey properly held and the United States Court of Appeals for the Third Circuit, properly affirmed that the MICU defendants, acting in their capacity as private, not-for-profit health care providers, were not state actors within the purview of 42 U.S.C. § 1983?

TABLE OF CONTENTS

Page

Counter-Statement of Questions Presented for Review i

Table of Contents ii

Table of Citations iii

Counter-Statement of Opinions Below 1

Statement of Jurisdiction 1

Federal Statutes Involved 1

Statement of Facts 2

Reasons for Denying the Writ 6

I. Petitioner has failed to present a compelling reason for granting writ of certiorari inasmuch as the decision below, to dismiss petitioner's 42 U.S.C. § 1985 claim, is consistent with principals enumerated by this Court. 7

II. Petitioner's request for writ of certiorari should be denied inasmuch as the finding of the District Court and Court of Appeals, that the MICU defendants were not state actors subject to liability under § 1983, did not conflict with decisions of this Court or any other court of appeals. 9

Conclusion 12

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Blum v. Yaretsky, 457 U.S. 991 (1982) 9, 10

Griffin v. Breckenridge, 403 U.S. 88 (1970) 6, 7, 8

Plasko v. City of Pottsville, 853 F. Supp. 1258 (E.D. Pa. 1994) 8

Rendell-Baker, et al. v. Kohn, et al., 457 U.S. 830 (1982) 6, 9

United States v. Price, 383 U.S. 787 (1966) 9

Statutes Cited:

42 U.S.C. § 1983 ..... i, 3, 5, 6, 9, 10

42 U.S.C. § 1985 ..... i, 3, 5, 6, 7

42 U.S.C. § 1985(3) 1

Respondents, Mountainside Hospital and MICU Attendants Davis and Dan MacMahon respectfully submit that Petitioner's request for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit entered on May 26, 1995, be denied.

COUNTER-STATEMENT OF OPINIONS BELOW

Petitioner has provided complete and accurate copies of all opinions below in this matter. However, respondents, MICU defendants, would like to call to the Court's attention that the Order of Judge Bissell dated June 7, 1994 granting summary judgment, dismissed plaintiff's federal claims with prejudice but dismissed the state claims without prejudice. As such, plaintiff has filed a state claim in this matter which is currently pending in the Essex County, Law Division bearing Docket Number L-12659-94. This Complaint addresses the state claims, sounding in negligence, as well as an additional claim that Ann Perlmutter was denied her civil rights secured by the New Jersey State Constitution.

STATEMENT OF JURISDICTION

Petitioner's jurisdictional statement is complete and correct.

FEDERAL STATUTES INVOLVED

In addition, to the statutes provided in Petitioner's statement, Petitioner's claim against the MICU defendants is based upon 42 U.S.C. §1985(3) which states:

> If two or more person in any State of Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any

person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

STATEMENT OF FACTS

The within matter, from its inception has involved no novel questions or unique interpretations of the law. To the contrary, Respondents, MICU defendants have at all times asserted well

established principals of law: that as private, not-for-profit health care workers they are not subject to liability under 42 U.S.C. § 1983 and that there must be some showing of invidious discriminatory animus for liability to be had under 42 U.S.C. § 1985.

The defendant, Mountainside Hospital, is a private, not-for profit corporation organized exclusively for hospital purposes and duly licensed under the laws of the State of New Jersey. The MICU defendants are two of the paramedics employed by that hospital who staff its mobile intensive care unit. These parties have absolutely no involvement with any state agency other than the fact that they respond to medical emergencies if requested by local authorities. The MICU would similarly respond to an emergency medical request by a private citizen.

On May 20, 1989, sometime after 11:30 p.m., Ann Perlmutter crashed through the window of a basement apartment in Bloomfield, New Jersey wherein a Ms. Julia Sinauskas resided. Ms. Sinauskas, understandably very frightened by this intrusion, ran to the telephone to call the police. According to Ms. Sinauskas, while she was on the telephone, Ms. Perlmutter headed towards her, smearing blood on the walls and "bouncing" off each side of the hallway walls.

The Bloomfield police, the BVES and the MICU defendants were dispatched to that address. The police arrived first. According to deposition testimony, upon their entry into the apartment, the police officers observed Ann Perlmutter on the bedroom floor, thrashing around, kicking her legs, wildly swinging her arms and making unintelligible noises. In addition, the police officers observed blood on Ms. Perlmutter's arms, legs and head.

Ms. Perlmutter's behavior at that time was considered by at

least one police officer to be extremely violent. Irrespective of her irrational, combative and violent behavior, the police officers attempted to talk to and calm Ann Perlmutter so as to prevent her from further injuring herself or injuring others.

The attempts by the police to calm down Ann Perlmutter were unsuccessful. Just prior to the decision to use restraints, Ms. Perlmutter lunged at a free standing, full length mirror, kicked at the mirror and tried to crash it down on top of herself. In order to prevent her from further injuring herself or injuring others, the police, using their best judgment in light of the surrounding circumstances, restrained Ann Perlmutter by cuffing her hands behind her back and wrapping a bed sheet around her ankles.

A two member crew from the Bloomfield Volunteer Emergency Squad (hereinafter the BVES) were the next individuals to arrive at the apartment. The BVES crew assisted the police in placing Ann Perlmutter on a Reeves stretcher and then on a rolling cot stretcher. The MICU paramedics were the last to arrive at the scene.

During this entire time period, Ann Perlmutter was continually combative and verbally abusive towards those individuals attempting to assist her. In fact, Ms. Perlmutter's behavior, which at this point included attempts to bite people that had their hands near her face, prevented any medical assessment or assistance to be administered by either the BVES crew or MICU attendants.

Ann Perlmutter was removed from the apartment on the rolling stretcher and transported to the waiting ambulance. As Ms. Perlmutter was being wheeled towards the ambulance she suddenly became quiet, causing the BVES and MICU personnel who were monitoring her condition to immediately respond and determine the reason for this occurrence. Upon discovering that Ms. Perlmutter had stopped breathing, the BVES crew and the

MICU paramedics immediately reacted by releasing all restraints and providing advanced life saving procedures.

Ms. Perlmutter was transferred to Clara Maass Hospital where she never regained consciousness. She died several days later. The autopsy report indicated traces of cocaine in her blood.

Dr. Barbara Lee Perlmutter, mother of decedent, brought suit against, *inter alia*, the Bloomfield Police Department, the Bloomfield Voluntary Emergency Squad, Mountainside Hospital, the Mountainside Intensive Care Unit and other individuals who participated in the incident that evening. The Petitioner charged the MICU defendants with medical malpractice resulting in wrongful death, and deprivation of constitutional rights pursuant to 42 U.S.C. § 1985 and 42 U.S.C. § 1983.

The District Court dismissed plaintiff's 42 U.S.C. § 1983 claim against the MICU defendants as these defendants are not-for-profit, private, health care workers, clearly not state actors and not operating under the color of state. As such the MICU defendants are not subject to liability under 42 U.S.C. § 1983. In addition, the District Court found the MICU defendants not subject to liability under 42 U.S.C. § 1985 as Petitioner failed to produce any evidence of invidious discriminatory animus behind the MICU defendants' actions required to sustain this claim.

Petitioner's brief in support of this writ for certiorari attempts to include the "ambulance personnel" under the umbrella of § 1983 liability for "standing by" while other officers "summarily punish" a third person within his or her presence or knowledge. Petitioner ignores the obvious flaw in this argument in that as private health care workers the MICU defendants cannot be liable under § 1983.

Petitioner simply cannot accept the fact that the harm which befell her daughter was not a result of any discriminatory act by the MICU defendants. If Petitioner has any legitimate claim, and Respondents contend otherwise, it is one of negligence which should be appropriately pursued in the pending state Court action.

REASONS FOR DENYING THE WRIT

Petitioner argues that certiorari should be granted in this matter as the court below has entered a decision in conflict with the decision of other United States Courts of Appeals on the same important issue. Petitioner, however, points to no conflicting case law on the issues for which summary judgment was granted on behalf of the MICU defendants.

This Court has clearly enunciated in previous decisions that for liability to be found under § 1985 there must be some evidence of invidious discriminatory animus behind the actions of the alleged conspirators. *Griffin v. Breckenridge*, 403 U.S. 88 (1970). In addition, this Court had held on numerous occasions that for liability to attach under § 1983 a person must be engaged in the complained of activity "under color" of the state. *Rendell-Baker, et al. v. Kohn, et al.*, 457 U.S. 830 (1982).

The decision of the District Court, affirmed by the Court of Appeals, regarding the MICU defendants did not in any way conflict with the decisions of other United States Courts of Appeals or with this Court. As such, it is respectfully requested

I.

PETITIONER HAS FAILED TO PRESENT A COMPELLING REASON FOR GRANTING WRIT OF CERTIORARI INASMUCH AS THE DECISION BELOW, TO DISMISS PETITIONER'S 42 U.S.C. § 1985 CLAIM, IS CONSISTENT WITH PRINCIPALS ENUMERATED BY THIS COURT.

Petitioner charged the defendants with conspiracy to interfere with Ann Perlmutter's civil rights under 42 U.S.C. § 1985. Petitioner, however, failed to advance the requisite evidence of a discriminatory animus. In *Griffin v. Breckenridge*, 403 U.S. 88, 101 (1970) this Court articulated that while the legislative intent of this statute "was meant to reach private action [it] does not, however mean that it was intended to apply to all tortious, conspiratorial interferences with the rights of others." In order to distinguish when this statute applies, this Court required an element of some racial or other class based discriminatory intent or animus.

> The language requiring intent to deprive of equal protection, or equal privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidious discriminatory animus behind the conspirators' action.

Id. at 102.

In *Griffin*, the type of alleged conduct which was found to rise to the level of a conspiracy, involved the defendants forcing the plaintiffs out of their automobile, "wilfully, intentionally and maliciously menanc[ing] and assault[ing] each of the plaintiffs by pointing firearms and wielding deadly blackjacks, pipes or

other kind of clubs, while uttering threats to kill and injure said plaintiffs." *Id.* at 91.

In the instant matter, petitioner alleges the existence of a conspiracy based upon the fact that the MICU defendants coordinated services with the Bloomfield Police Department. In his opinion of June 7, 1994, the Honorable John W. Bissell, U.S.D.J. found that "the existence of these communications do not establish the discriminatory intent necessary to establish a § 1985 conspiracy." (App. 46). This ruling is consistent with the principles applied by other United States Courts of Appeals.

In *Plasko v. City of Pottsville*, 853 F. Supp. 1258, 1267 (E.D. Pa. 1994), the court stated that:

> In order to state a cause of action for violations of this [a § 1985] section, the following must be alleged: (1) a conspiracy by the defendants; (2) designed to deprive plaintiff of the equal protection of the laws; (3) the commission of an overt act in furtherance of that conspiracy; (4) a resultant injury to person or property or a deprivation of any right or privilege of citizens; and (5) defendants' actions were motivated by a racial or otherwise class based invidiously discriminatory animus. *See Griffin v. Breckenridge*, 403 U.S. 88, 102-103, 91 S.Ct. 1790, 1798-1799, 29 L.Ed.2d 338 (1971); *Robison v. Canterbury Village, Inc.* 848 F.2d 424, 430 (3rd Cir. 1988) (racial or other prohibited animus necessary element of section 1985(3) claim; Section 1986 claim companion to Section 1985(3) claim); *Pratt v. Thornburgh*, 807 F.2d 355, 357 (3rd Cir. 1986).

Petitioner failed to produce even a scintilla of evidence demonstrating that the MICU defendants were involved in a conspiracy designed to purposefully deprive Ann Perlmutter of her civil rights as a result of some deep-seated, racially motivated resentment or hostility. In the absence of this evidence, summary judgment of this claim was appropriate.

II.

PETITIONER'S REQUEST FOR WRIT OF CERTIORARI SHOULD BE DENIED INASMUCH AS THE FINDING OF THE DISTRICT COURT AND COURT OF APPEALS, THAT THE MICU DEFENDANTS WERE NOT STATE ACTORS SUBJECT TO LIABILITY UNDER § 1983, DID NOT CONFLICT WITH DECISIONS OF THIS COURT OR ANY OTHER COURT OF APPEALS

It is a well established principal that for liability to attach under 42 U.S.C. § 1983 a person must be engaged in the complained of activity "under color" of the state.

Citing *United States v. Price*, 383 U.S. 787, 794 (1966) this Court in *Rendell-Baker, et al. v. Kohn, et al.*, 457 U.S. 830, 838 (1982) stated that:

> In cases under § 1983, "under color", of law has consistently been treated as the same thing as "state action" required under the Fourteenth Amendment.

This Court in *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982), held that state regulation is not enough to prove state action but that:

> The complaining party must also show that there is a sufficiently close nexus between the

> State and the challenged action of the regulated entity so that the actions of the latter may be fairly treated as that of the State itself. (cite omitted)

This Court went on to say that this nexus can exist.

> When [the State] has exercised coercive power or has provided such significant encouragement, either overt or covert, the that choice must in law be deemed to be that of the State . . .[or] the required nexus may be present if the private entity has exercised powers that are "traditionally the exclusive prerogative of the State. (cite omitted)

Blum at 1004-1005.

In the instant action, Petitioner has failed to provide any evidence to indicate that the State, acting through the Bloomfield Police Department, exercised coercive power over the MICU defendants or conversely that the MICU defendants coerced the police into any action. To the contrary, the record showed that each entity had its own individual function when responding to an emergency situation. Specifically, the police are responsible, if necessary, for securing or subduing a patient; the BVES personnel are responsible for transportation of the patient; and the MICU Paramedics are responsible for the medical control or treatment of the patient.

Judge Bissell, in his decision of June 7, 1994 stated that the reasons "which prevented § 1983 liability from attaching to BVES, prohibits § 1983 liability from attaching to the Mountainside defendant." (App. 48). Judge Bissell opined that the decisive inquiry in determining § 1983 liability was whether

the defendants were engaged in activity traditionally a function of the state. (App. 14). Judge Bissell held that "the plaintiff has not brought forward any evidence that emergency services are traditionally a function of the state. Furthermore, numerous other courts have found that ambulance/emergency services are not traditionally functions of the state. *See McKinney v. West End Voluntary Ambulance Association*, 821 F. Supp. 1013, 1018 (E.D. Pa. 1992); *Krieger v. Bethesda-Chevy Chase Rescue Squad*, 599 F. Supp. 770, 773 (D. Md. 1984); *Eggleston v. Prince Edward Volunteer Rescue Squad, Inc.*, 569 F. Supp. 1344, 1350-51 (E.D. Va. 1983). Therefore, BVES [and subsequently MICU] and its members are not state actors." (App. 14-15). The Court of Appeals affirmed Judge Bissell's decision, a decision which involves no conflict with existing law.

CONCLUSION

Petitioner has set forth no compelling reason for the writ of certiorari to be granted. The decision of the District Court, affirmed by the Court of Appeals is consistent with the decision of this Court as well as other United States Courts of Appeals. Petitioner's dissatisfaction with the prior decision is no basis for this Court to grant certiorari and as such it is respectfully requested that Petitioner's request for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit entered on May 26, 1995, be denied.

Respectfully submitted,

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Supreme Court, U.S.
FILED
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(3)

No. 95-579

In The

Supreme Court of the United States

October Term, 1995

DR. BARBARA LEE PERLMUTTER, *et al.*,

Petitioners,

vs.

MICHAEL COOPER, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS MICHAEL COOPER, ROBERT HOCHSTUHL, CHARLES PRIOLO AND MICHAEL BEHRE

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the federal courts lack power to determine on summary judgment the "objective reasonableness" of police conduct in effecting a restraint of an individual under the standard set in *Graham v. Connor*, 490 U.S. 386 (1989)?

2. Whether the lower courts abused their discretion by refusing to consider additional expert testimony submitted for the first time in connection with a motion for reconsideration after considering six separate expert reports submitted before the grant of summary judgment?

LIST OF PARTIES

DR. BARBARA LEE PERLMUTTER, General Administratrix and Administratrix ad Prosequendum of the Estate of Ann Perlmutter; and DR. BARBARA LEE PERLMUTTER, Individually,

Petitioners,

and

MICHAEL COOPER, Individually and as a Police Officer of the Bloomfield Police Department; ROBERT HOCHSTUHL, Individually and as a Police Officer of the Bloomfield Police Department; PTL. PRIOLO, Individually and as a Police Officer of the Bloomfield Police Department; JOHN DOE, Individually and as a Police Officer of the Bloomfield Police Department; SGT. BEHRE, Individually and as a Police Officer of the Bloomfield Police Department; JOHN MC NIFF, Individually and as a Police Officer of the Bloomfield Police Department; THE POLICE DEPARTMENT OF THE TOWNSHIP OF BLOOMFIELD; F. MENZEL, Individually and as Captain of the Bloomfield Volunteer Emergency Squad; A. DEPCZEK, Individually and as attendant of the Bloomfield Volunteer Emergency Squad; JOHN DOE II, Individually and as attendant of the Bloomfield Volunteer Emergency Squad; Ambulance Attendant DAVIS, Individually and as attendant of the Mountainside Hospital Mobile Intensive Care Unit (MICU aka Med VII); DAN MAC MAHON, Individually and as attendant of the Mountainside Hospital Mobile Intensive Care Unit (MICU aka Med VII); JOHN DOE III, Individually and as attendant of the Mountainside Hospital Mobile Intensive Care Unit (MICU aka Med VII); and MOUNTAINSIDE HOSPITAL,

Respondents.

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
List of Parties	ii
Table of Contents	iii
Table of Citations	iv
Opinions and Judgments Below	1
Statement of the Case	2
Reasons for Denying the Writ	7
I. The Lower Courts Properly Found The Police Officers Met The Standard Set Forth In *Graham v. Connor* And Dismissed Petitioners' Civil Rights Claims On Summary Judgment.	7
A. The "Objective Reasonableness" Standard In *Graham v. Connor* Can Be Determined As A Matter Of Law By The Courts.	8
B. There Is No Conflict Among The Circuits Regarding Disposition Of Excessive Force Claims By Summary Judgment.	10
II. The District Court Considered All Factual Material Presented And Did Not Abuse Its Discretion By Refusing To Consider An "Oral" Expert Report Submitted After Summary Judgment Was Granted.	15

Contents

Page

Conclusion 19

TABLE OF CITATIONS

Cases Cited:

Anderson v. Creighton, 483 U.S. 635 (1987) 9

Anderson v. Liberty Lobby, 477 U.S. 242 (1986) 8, 11

Brisk v. City of Miami, 726 F. Supp. 1305 (S.D. Fla. 1989) 12

Calamia v. City of New York, 879 F.2d 1025 (2d Cir. 1989) 12, 14

Chew v. Gates, 27 F.3d 1432 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 1097 (1995) 12, 13, 14

Culver v. Town of Torrington, Wyo., 930 F.2d 1456 (10th Cir. 1991) 11

Dean v. City of Worcester, 924 F.2d 364 (1st Cir. 1991) ... 12

Eberle v. City of Anaheim, 901 F.2d 814 (9th Cir. 1990) .. 12, 13

Foote v. Dunagan, 33 F.3d 445 (4th Cir. 1995) 11

Graham v. Connor, 490 U.S. 386 (1989) ....i, 2, 7, 8, 9, 10, 12, 13, 14

Contents

Page

Hammer v. Gross, 932 F.2d 842 (9th Cir. 1991), *cert. denied*, 502 U.S. 980 (1991) 12

Harlow v. Fitzgerald, 457 U.S. 800 (1982) 9, 10

Kopf v. Skyrm, 993 F.2d 374 (4th Cir. 1993) 16

Krueger v. Fuhr, 991 F.2d 435 (8th Cir. 1993), *cert. denied*, 114 S. Ct. 386 (1993) 11

Malley v. Briggs, 475 U.S. 335 (1986) 9

Maravilla v. United States, 60 F.3d 1230 (7th Cir. 1995) .. 11

Melear v. Spears, 862 F.2d 1177 (5th Cir. 1989) 12

Reese v. Anderson, 926 F.2d 494 (5th Cir. 1991) 11

Roy v. Inhabitants of City of Lewiston, 42 F.3d 691 (1st Cir. 1994) 18

Russo v. Cincinnati, 953 F.2d 1036 (6th Cir. 1992) 16

Semper v. Santos, 845 F.2d 1233 (3d Cir. 1988) 17

Smith v. Freland, 954 F.2d 343 (6th Cir. 1992), *cert. denied*, 504 U.S. 915 (1992) 11

Technitrol, Inc. v. Control Data Corp., 550 F.2d 992 (4th Cir.), *cert. denied*, 434 U.S. 822 (1977) 16, 17

Contents

Page

Thompson v. City of Lawrence, Kansas, 58 F.3d 1511 (10th Cir. 1995) 11

Wilson v. Meeks, 52 F.3d 1547 (10th Cir. 1995) 18

United States Constitution Cited:

Fourth Amendment 8, 11

Statute Cited:

42 U.S.C. § 1983 9

Rule Cited:

Federal Rule of Civil Procedure 56 8

Other Authority Cited:

Michael C. Fayz, Comment, *Graham v. Connor: The Supreme Court Clears The Way For Summary Dismissal Of Section 1983 Excessive Force Claims*, 36 Wayne Law Rev. 1507 (1990) 9

APPENDIX

Appendix A — Transcript of Proceedings Dated May 23, 1994 ..... 1a

No. 95-579

In The

Supreme Court of the United States

October Term, 1995

DR. BARBARA LEE PERLMUTTER, *et al.*,

Petitioners,

vs.

MICHAEL COOPER, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS MICHAEL COOPER, ROBERT HOCHSTUHL, CHARLES PRIOLO AND MICHAEL BEHRE

OPINIONS AND JUDGMENTS BELOW

The oral opinion of the United States District Court dated May 23, 1994, not included in petitioners' appendix, is reproduced in the appendix hereto.

STATEMENT OF THE CASE

Upon a voluminous and complete record, the District Court and Court of Appeals for the Third Circuit found summary judgment appropriate dismissing petitioners' civil rights claims against the respondent police officers. The lower courts properly utilized the summary judgment vehicle to dispose of these claims without a jury based on the absence of any genuine issue as to any of the material facts that established the objective reasonableness of the police officers' conduct as a matter of law. Contrary to the unsupported assertions in the Petition, there is absolutely no conflict among the circuit courts of appeal with respect to the power of the federal courts to make that determination upon an appropriate factual record. The Petition for a Writ of Certiorari is meritless.

Because petitioners' Statement of the Case presents an inaccurate and grossly distorted description of the factual record before the lower courts, we are constrained to correct the misstatements and set forth the undisputed material facts upon which the courts below properly granted summary judgment in favor of the police officers. In the absence of the false light cast by the Petition, this record vividly illustrates the effectiveness, indeed the necessity, of the summary judgment device in weeding out unworthy claims of unreasonable governmental seizures under the standard set in *Graham v. Connor,* 490 U.S. 386 (1989).

Nine eyewitnesses to the incident, including the respondent police officers, the medical personnel and Julia Sinauskas, the tenant of the apartment in which the incident occurred, provided sworn deposition testimony.[1] The account of each witness was

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1. Contrary to petitioners' contention that the District Court based its findings "solely on the police testimony," the record below contained the entire deposition transcripts of each and every eyewitness to the event. Indeed, the District Court required that the complete transcripts be submitted before it would even rule on defendants' motions for summary judgment.

wholly consistent and uncontradicted. It was on the basis of this first-hand testimony of all the participants in the incident that the District Court concluded that the police officers' conduct in the course of a pre-arrest detention, restraining a violent, drug intoxicated woman who had illegally entered the basement apartment of her neighbor by crashing through her window, was objectively reasonable as a matter of law. (A.28).

The undisputed facts established that at approximately one o'clock in the morning on May 20, 1989, the decedent crashed through the glass window of Mrs. Sinauskas' basement apartment and fell approximately four feet to the floor.[2] (A.23, 30) (R.55-56; 130-32). Mrs. Sinauskas, who testified that she was sleeping at the time the decedent crashed through her window, was frightened by the intruder and immediately telephoned the police for assistance. The police, however, were already on their way to the apartment building because another tenant had reported observing a woman (presumably the decedent) "face down" on the front lawn of that building minutes earlier. Mrs. Sinauskas testified that the decedent wandered around her apartment, bouncing off the walls. (R.532; 536-38).

Shortly thereafter, police officers Michael Cooper and Charles Priolo arrived at the scene, at which time the decedent ran away from them into Mrs. Sinauskas' bedroom and began rolling around the floor, violently thrashing her arms and legs and making loud, incoherent noises. (R.134; 137; 257; 264-65). Mrs. Sinauskas testified that although she remained in her living room while the police officers attempted to calm the decedent, she could see the decedent on the floor kicking her feet and hands. The officers also observed that the drug intoxicated decedent had

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2. Contrary to petitioners' unsupported allegation, there is no evidence in the record that the decedent was thrown through the window or was herself the victim of any crime.

splats of dried blood about her body, warranting further investigation that was impossible to make while she was violently thrashing around the floor in constant movement. (A.25) (R.506; 560-61).

Officers Cooper and Priolo initially attempted to calm the decedent by crouching on the floor next to her and talking to her. According to Officer Cooper, after several minutes of talking to the decedent, she briefly stopped thrashing around and sat up, although she still was not verbally responding to the police officers' questions. After a couple of minutes of remaining relatively calm while the police officers talked to her, the decedent suddenly lunged toward a stand-alone full length mirror located in Mrs. Sinauskas' bedroom in an apparent attempt to cause the mirror to fall onto her. Officer Cooper quickly grabbed the mirror to prevent it from falling upon the decedent and further injuring her.

At that point, the decedent again became extremely violent, thrashing her arms and legs and directing her movements at the police officers. The evidence established that the decedent directed her aggression toward the police officers by "punching out" and "throwing her arms." (R.596-97). Moreover, the decedent did not respond to the police officers' verbal instructions to calm down.

By this time, the Bloomfield Volunteer Emergency Squad ("BVES") had arrived on the scene but was unable to conduct a medical assessment because of the decedent's combative state. Based on the decedent's failure or refusal to respond to their verbal instructions to stop kicking, punching and thrashing, the police officers determined that it was necessary to restrain the decedent to prevent her from injuring herself, them and the residents of the apartment and to permit the BVES to conduct a medical assessment. (A.29) (R.140-43; 269; 587-88; 594-95).

The officers initially attempted to restrain the decedent by holdi[illegible]er in place. (R.141). The police officers, however, were unable to control her violent movements and were forced to restrain the decedent by handcuffing her wrists behind her back and securing her ankles with a bed sheet.[3] Immediately after the decedent was restrained, she was promptly lifted by the BVES onto a reeves stretcher provided by the BVES. (R.151).[4] Despite the restraints, the decedent continued to thrash her body and fight the efforts of the police officers and medical personnel. (A.23-24) (R.564-65).

Upon their arrival, the BVES assumed medical control of the scene, and the Mountainside Hospital Mobile Intensive Care Unit ("MICU") paramedics assumed control upon their arrival. Paramedic Daniel MacMahon from MICU testified that he could not conduct a full medical assessment of the decedent without the risk of injury to himself and others because the decedent was attempting to bite people who had their hands next to her face, and was trying to escape whenever someone let go. (A.28) (R.335; 510). Paramedic Robert Davis from MICU observed that as the decedent was being lifted from the floor onto the reeves stretcher, she was moving her head around screaming, shouting and fighting the police and BVES. (A.24) (R425; 431). As a result, the BVES members were unable to lift the decedent onto the reeves stretcher without some assistance from the police officers.

After the decedent was placed on the reeves stretcher

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3. Petitioners assert in their Statement of the Case that the decedent was "hog tied." The undisputed evidence established that the decedent was not "hog tied" — *i.e.*, the hands and feet tied together — but rather her hands and ankles were separately secured. (R.140-43; 267; 269; 587-88; 594-95).

4. Police officer Hochstuhl estimated this time to be "under a minute." (SR.233) ("SR. __" refers to respondents' Supplemental Appendix in the Third Circuit).

stomach down, head to the side without any restriction on her breathing, the BVES used the straps located on the reeves stretcher to secure the decedent's position on the stretcher to protect her from falling or further injuring herself, particularly in light of her combative state. (A.24) (R.149; 275; 381; 535). The BVES members then promptly carried the decedent out of the apartment on the reeves stretcher and strapped her to the rolling cot. (A.24) (R.565; SR.411). The undisputed evidence established that the police officers and medical personnel acted in very difficult circumstances quickly and appropriately to gain control of the decedent and move her out of the apartment, and get her into the ambulance for transportation to the hospital.

Among their numerous unsupported assertions, petitioners claim that the amount of time that the decedent was unconscious was hotly contested. The undisputed evidence, however, established that the decedent was in constant movement and yelling from the moment she was placed on the reeves stretcher and for the less than a few minutes that followed as she was being removed from the apartment by the medical personnel. (R.149; 275; 332-33; 431-32; 564-66; 591). As the District Court found, there was simply no evidence that the decedent was in distress for any period of time. (A.30).

Petitioners also assert erroneously that the police officers placed the decedent on the reeves stretcher, fastened the straps of the reeves stretcher and carried her out on the stretcher. The voluminous factual record, however, does not contain any proof that the police officers either made the decision as to how to position the decedent on the reeves stretcher or fastened the straps to secure her. To the contrary, based on the undisputed testimony of the medical personnel, as well as the report of petitioners' own expert, Richard Hansson, the medical personnel — not the police officers — were responsible for the decedent's medical transportation and care. (R.304; 338; 442; 562; 567; 575; SR.391; 410-11).

The undisputed evidence also established that the moment the medical personnel observed the decedent to have ceased breathing, they immediately released all restraints and began to resuscitate the decedent by administering life-saving procedures. (A.30) (R.339-41; 443-44; 568-69). The decedent apparently responded and was transported to the hospital. She did not, however, regain consciousness for approximately four days at which time petitioners decided to remove the decedent from life sustaining equipment in the hospital.

It was on the basis of these undisputed material facts that the District Court and the Court of Appeals properly concluded that the police officers' conduct in restraining the decedent was objectively reasonable as a matter of law.

REASONS FOR DENYING THE WRIT

I

THE LOWER COURTS PROPERLY FOUND THE POLICE OFFICERS MET THE STANDARD SET FORTH IN *GRAHAM V. CONNOR* AND DISMISSED PETITIONERS' CIVIL RIGHTS CLAIMS ON SUMMARY JUDGMENT.

In support of the Petition for a writ, petitioners assert, as they unsuccessfully argued in the courts below, that summary judgment was inappropriate because the "objective reasonableness" of the police officers' conduct can *only* be decided by a jury. There is nothing in the opinion in *Graham v. Connor* — or in the many lower court decisions applying the *Graham* standard — that even remotely suggests that the summary judgment rule is not available (and a jury trial is required) in civil rights cases alleging the use of excessive force in which there is no genuine issue as to any material fact. Nor is

there any discord among the circuit courts of appeal. As shown below, since the Court established the standard of objective reasonableness in *Graham*, the lower courts have uniformly applied Rule 56 to dismiss claims where there was no genuine issue of material fact and the evidence was so one-sided that one party must prevail as a matter of law, and, of course, to allow claims to reach a jury where the facts were genuinely disputed and the evidence presented a sufficient disagreement. *See Anderson v. Liberty Lobby*, 477 U.S. 242, 251-52 (1986).

A. The "Objective Reasonableness" Standard In *Graham v. Connor* Can Be Determined As A Matter Of Law By The Courts.

In *Graham v. Connor*, the Court held that claims alleging that law enforcement officials used excessive force in the course of an arrest or other seizure of a person should be determined under the Fourth Amendment's "objective reasonableness standard." 490 U.S. at 395-96. Under this standard, "the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motive." *Id.* at 396. The reasonableness of the force used "must be judged from the perspective of a reasonable officer at the scene, rather than with the 20/20 vision of hindsight." *Id.*

Moreover, in assessing the reasonableness of the force used, the courts must consider the fact that police officers are often "forced to make split-second judgments — in circumstances that are tense, uncertain, and rapidly evolving — about the amount of force that is necessary in a particular situation." *Id.* at 397. Because the Fourth Amendment's reasonableness test is "not capable of precise definition or mechanical application," the *Graham* opinion instructs that in determining whether the force used was reasonable, the courts must consider "the facts and

circumstances of each particular case" while "balancing the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." *Id.* at 396.

Finally, the Court made clear that "the subjective motivation of the individual officers . . . has no bearing on whether a particular seizure is unreasonable under the Fourth Amendment." *Id.* at 397. In so holding, the Court eliminated the inquiry into subjective concepts of "good faith," "malice" and "sadism," thus paving the way for summary disposition of § 1983 excessive force claims when the material facts are undisputed. *Id.* at 398-99.[5]

By adopting an objective standard and rejecting a subjective one, the *Graham* Court brought the test for judging the reasonableness of a seizure in line with that applied to other civil rights claims and defenses, which allows summary judgment to "avoid excessive disruption of government and permit the resolution of many insubstantial claims." *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982). *See also Malley v. Briggs*, 475 U.S. 335, 341 (1986); *Anderson v. Creighton,* 483 U.S. 635, 640 n.2. (1987). Indeed, if petitioners' claim based on a snippet from the *Graham* opinion — *i.e.*, "careful attention [must be given] to the facts and circumstances of each particular case" — were taken to its logical conclusion, every excessive force claim would be required to go to a jury, and law enforcement personnel would spend more time in court defending their actions than enforcing the law because no claim against the police based on a seizure —

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5. As one commentator put it, the elimination of the good faith component removed the last remaining obstacle to disposition of excessive force claims at the summary judgment stage. Michael C. Fayz, Comment, *Graham v. Connor: The Supreme Court Clears The Way For Summary Dismissal Of Section 1983 Excessive Force Claims,* 36 Wayne Law Rev. 1507 (1990).

no matter how insubstantial — could be disposed of by summary judgment. We respectfully submit that the Court did not intend to deprive the lower federal courts of their power to apply the procedural rules to this genre of civil rights claims.[6]

In entering summary judgment in favor of the respondent police officers here, the District Court recognized that the *Graham* standard required "stand[ing] in [the police officer's] shoes and judg[ing] the reasonableness of his actions based on the information he possessed and the judgment he executed in responding to that situation." The undisputed facts and circumstances that confronted the police officers upon their arrival at the scene and the undisputed account of events in the following minutes given by nine eyewitnesses provided an unusually clear and ample record upon which the lower courts properly grounded their decisions.

The District Court correctly concluded in an opinion unanimously affirmed by the Third Circuit Court of Appeals that the police officers' conduct in restraining the decedent and assisting the BVES in placing her on the reeves stretcher was objectively reasonable as a matter of law because "no rational jury could find otherwise." (A.30).

B. There Is No Conflict Among The Circuits Regarding Disposition Of Excessive Force Claims By Summary Judgment.

Contrary to the claim made in the Petition, the circuit courts

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6. The determination of whether a government official is entitled to qualified immunity is also a question of law to be decided by the courts. *See Harlow v. Fitzgerald*, 457 U.S. 800, 817 (1982). Thus, the resolution of the objective reasonableness issue on summary judgment is consistent with the policy of encouraging pretrial, speedy determinations of immunity defenses where there is no genuine issue as to the material facts and the evidence is so one-sided that one party must prevail as a matter of law.

have uniformly resolved the issue of "objective reasonableness" as a matter of law where the material facts are not in dispute and a reasonable jury could not find that the police officer's conduct was not reasonable.[7] *See, e.g., Maravilla v. United States*, 60 F.3d 1230, 1234 (7th Cir. 1995) (**Seventh Circuit** affirming summary judgment in favor of police officers on excessive force claim, finding conduct reasonable as a matter of law); *Thompson v. City of Lawrence, Kansas*, 58 F.3d 1511, 1516 (10th Cir. 1995) (**Tenth Circuit** holding officers' actions in handcuffing plaintiff were not unreasonable as a matter of law given totality of circumstances); *Foote v. Dunagan*, 33 F.3d 445, 448-50 (4th Cir. 1995) (**Fourth Circuit** reversing judgment of liability against officer on excessive force claim, finding conduct reasonable as a matter of law); *Krueger v. Fuhr*, 991 F.2d 435, 439-40 (8th Cir. 1993), *cert. denied*, 114 S. Ct. 386 (1993) (**Eighth Circuit** reversing and remanding to District Court for entry of summary judgment, finding officer's conduct objectively reasonable and not violative of decedent's Fourth Amendment rights); *Smith v. Freland*, 954 F.2d 343, 347 (6th Cir. 1992), *cert. denied*, 504 U.S. 915 (1992) (**Sixth Circuit** affirming District Court's grant of summary judgment, finding police officers acted reasonably in using deadly force to apprehend motorist); *Culver v. Town of Torrington, Wyo.*, 930 F.2d 1456, 1461 (10th Cir. 1991) (**Tenth Circuit** affirming grant of summary judgment dismissing plaintiff's § 1983 claim of excessive force); *Reese v. Anderson*, 926 F.2d 494, 500 (5th Cir. 1991) (**Fifth Circuit** reversing District Court's denial of officer's motion for summary judgment, finding officer's shooting of decedent reasonable as a

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7. In some of the cases cited herein, the court directed a verdict in favor of the police officers. Because the standard for assessing whether a litigant is entitled to a directed verdict is "very close" to the summary judgment standard, *i.e.*, where no reasonable jury could find in favor of the non-moving party, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251 (1986), the cited decisions involving directed verdicts fully support the courts' power to determine these civil rights claims on summary judgment.

matter of law); *Dean v. City of Worcester,* 924 F.2d 364, 369 (1st Cir. 1991) (**First Circuit** affirming District Court's grant of summary judgment on plaintiff's excessive force claim, finding plaintiff failed to raise trial-worthy issue concerning objective reasonableness of force used to effect arrest); *Eberle v. City of Anaheim,* 901 F.2d 814, 820 (9th Cir. 1990) (**Ninth Circuit** holding officers entitled to directed verdict where as a matter of law finger-hold applied to spectator at football game did not amount to excessive force).

Ignoring decision after decision in *every* circuit in which the courts have decided objective reasonableness as a matter of law, petitioners are left with totally inapposite cases in which summary judgment was found to be inappropriate because either (i) there was a disputed material fact (*see Brisk v. City of Miami,* 726 F. Supp. 1305 (S.D. Fla. 1989)) or (ii) the court in applying the *Graham* standard to the facts of that particular case concluded a rational jury could find the conduct was not "objectively reasonable" (*see Chew v. Gates,* 27 F.3d 1432 (9th Cir. 1994), *cert. denied,* 115 S. Ct. 1097 (1995) ; *Hammer v. Gross,* 932 F.2d 842 (9th Cir. 1991), *cert. denied,* 502 U.S. 980 (1991); *Melear v. Spears,* 862 F.2d 1177 (5th Cir. 1989); *Calamia v. City of New York,* 879 F.2d 1025 (2d Cir. 1989)).

For example, in *Chew v. Gates,* a police officer intentionally released a trained attack dog to locate and retrieve plaintiff who had run and hid in a scrap yard from police after being stopped for a traffic violation. The District Court had dismissed the civil rights claim against several defendants on the ground that the Los Angeles police department had routinely used such dogs to apprehend criminals. The Ninth Circuit reversed, finding that a rational jury could have found that the use of an attack dog under the circumstances was not reasonable. 27 F.3d at 1441.

The *Ninth Circuit* in *Chew* did not, evidently, conclude that

the reasonableness of the force is a jury question in every case. *See also Eberle*, 901 F.2d at 820 (directing verdict in favor of officers on an excessive force claim). Rather, the Ninth Circuit determined the reasonableness of the conduct by balancing, as required by *Graham*, "the nature and quality of the intrusion on the individual's Fourth Amendment rights against the countervailing government interests." *Chew*, 27 F.3d at 1440.

The factual bases for the circuit court's decision in *Chew* are what distinguishes it from the case *sub judice*. First, the *Chew* court found that the force used was deadly and the police officer should have expected plaintiff to be severely mauled when he released the dog. 27 F.3d at 1440. Second, the court found that plaintiff did not present an immediate threat of harm to anyone and did not actually resist arrest. *Id.* at 1441-42. Finally, *Chew* did not involve a situation in which the police "were forced to make split-second judgments in circumstances that were rapidly evolving." *Id.* at 1443. Rather, the plaintiff had been trapped in a gateyard for two hours, and there was ample time for deliberation and consultation with supervisors before the police officer decided to release the dog to capture plaintiff. *Id.* Under all of those circumstances, the *Chew* court explained, "the *Graham* factors do not support either side" and reasonableness could not be decided as a matter of law. *Id.*

In contrast, the *Graham* factors all support the objective reasonableness of the police officers' conduct here. The police did not engage in any intentional conduct that would have caused them reasonably to believe that the decedent would sustain any type of injury. To the contrary, the police officers restrained the decedent and the medical personnel strapped her on a stretcher to get her to a hospital for medical help. Second, the decedent did present an immediate threat of harm not only to others but also to herself. Under the circumstances, the police officers had to take some action to restrain her combative condition. Finally, the total

incident occurred within a brief period of time, and the police officers were faced with making split-second decisions in circumstances that were rapidly evolving. Their actions could hardly be said to violate any constitutional right of the decedent. In these circumstances, unlike those presented in *Chew*, no rational jury could conclude that the police officers' conduct was not objectively reasonable.

Nor does the decision in *Calamia*, 879 F.2d 1025, provide any support for the thesis that excessive force claims must go to a jury. The case is also readily distinguishable from the case *sub judice*. In *Calamia*, the officers went to plaintiff's apartment in the middle of the night to arrest him on theft charges. As soon as the decedent answered the door, the police officers immediately shoved him to the floor and tightly cuffed plaintiff's hands behind his back. The evidence showed that the handcuffs were unduly tight and plaintiff was kept in that painful condition for five or six hours with no circulation in his hands while the officers collected certain property. *Id.* at 1035.

By contrast, the evidence here showed that the respondent police officers did not immediately restrain the decedent upon finding that she had illegally broken into an apartment, notwithstanding she was exhibiting violently aggressive behavior. Upon determining that restraints were necessary to protect the decedent from injuring herself and others, however, the police acted quickly and appropriately to gain control of the decedent and promptly move her out of the apartment and to the hospital to afford her medical treatment. (A.29).

Each and every circuit court of appeals has uniformly applied this Court's opinion in *Graham*, adhering to the well-established policy favoring pretrial disposition of cases in which there is no genuine issue as to any material facts and the evidence is so one-sided that one party must prevail as a matter of law. The

District Court and the Third Circuit Court of Appeals in the case *sub judice* dismissed petitioners' excessive force claims against the respondent police officers upon a record of undisputed material facts establishing that the police conduct was objectively reasonable as a matter of law. The Petition for a writ should be denied.

II.

THE DISTRICT COURT CONSIDERED ALL FACTUAL MATERIAL PRESENTED AND DID NOT ABUSE ITS DISCRETION BY REFUSING TO CONSIDER AN "ORAL" EXPERT REPORT SUBMITTED AFTER SUMMARY JUDGMENT WAS GRANTED.

Petitioners also assert that the District Court failed to consider their submissions and their expert reports in opposition to the police officers' motion for summary judgment. They are simply wrong (A.60 n.2). Indeed, the record shows that the District Court reviewed *six* expert reports before deciding respondents' motion for summary judgment.[8] (R.788-827). Notwithstanding that the District Court did not specifically address all of petitioners' expert reports in its written Opinion dated June 7, 1994, a review of the transcript of oral argument of the summary judgment motion (not included in petitioners' appendix) destroys petitioners' assertion. (Resp. App. 13a-15a; 19a-23a).

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8. Petitioners' counsel was given at least three extensions to obtain the expert reports they deemed necessary to support petitioners' claims. By the final deadline, December 29, 1993, petitioners had obtained two reports from Robert diGrazia, an alleged expert on police procedures, a report from Bennett M. Derby, M.D. and a report from Richard J. Hansson, Esq., EMT-P. After respondents filed their motions for summary judgment, petitioners obtained a supplemental report from Mr. Hansson and a supplemental report from Mr. diGrazia. All of these reports, including the ones that were untimely, were considered by the District Court.

During oral argument, the District Court specifically questioned counsel for the respondent police officers concerning the import of petitioners' expert reports to the motion before the court. (Resp. App. 19a-22a). In addition, although petitioners failed to provide this Court with the transcript of oral argument, the written opinion denying petitioners' second motion for reconsideration reveals that the District Court considered *all* of the evidence submitted by petitioners in opposition to the respondent police officers' motion for summary judgment, including their expert reports. (A.60-61). In that opinion, the District Court unambiguously stated:

> The Court has carefully reviewed all papers submitted and determines that no viable basis has been submitted by any party for reconsideration of the opinions and orders previously entered in this matter.

(A.61). Finally, the District Court noted that although it had not considered the one untimely expert report, the "Court has also considered plaintiff's supplemental affidavit dated June 16, 1994, and its exhibits." (A.60 n.2). That supplemental affidavit and exhibits contained the very information petitioners now assert was not considered.

Because the District Court considered petitioners' expert reports, the cases cited by petitioners — *Russo v. Cincinnati*, 953 F.2d 1036 (6th Cir. 1992); *Technitrol, Inc. v. Control Data Corp.*, 550 F.2d 992 (4th Cir.), *cert. denied*, 434 U.S. 822 (1977); and *Kopf v. Skyrm*, 993 F.2d 374 (4th Cir. 1993) — are inapposite. *Kopf* dealt with the court's wholesale exclusion of all expert testimony and not the refusal to consider one of seven expert reports that was submitted in an untimely fashion in support of a motion for reconsideration. *Russo* involved the usefulness of expert testimony in a failure to train claim, not a claim of

excessive force. *Technitrol* stands for the unremarkable proposition that summary judgment is inappropriate where conflicting expert opinions are determinative. None of these issues is present in this case.

The lower courts' decisions in this case comport with the established principle that untimely evidence submitted in support of a motion for reconsideration is wholly improper and need not be considered by the court in its discretion. The court's refusal to consider petitioners' one untimely expert report (while considering six others) was not an abuse of discretion and is not in conflict with decisions in any other circuit. *See Semper v. Santos,* 845 F.2d 1233, 1238 (3d Cir. 1988) (trial court's exclusion of testimony because of failure of counsel to abide by pretrial order not an abuse of discretion).

Petitioners also criticize the courts below for allegedly adopting the "factual contentions" of the respondents without commenting on the so-called substantial evidential submissions by petitioners. This argument is false, and petitioners fail to identify a single material fact that the courts below failed to consider or any material facts that were in genuine dispute.

The facts and circumstances of the incident that occurred on the night of May 20, 1989 are well-documented in the uncontroverted deposition testimony of the nine eyewitnesses who were present. The District Court had all the evidence before it when it granted summary judgment in favor of the respondent police officers. Petitioners did not — and could not — submit any evidence to dispute these facts because no such evidence existed. In these circumstances, petitioners properly suffered entry of summary judgment against them.

In any event, the expert reports submitted by petitioners were insufficient as a matter of law to avoid summary judgment

dismissing petitioners' civil rights claims. Even assuming *arguendo* (contrary to the evidence in the record) that the decedent was improperly strapped onto the stretcher,[9] as petitioners' experts opined, the respondent police officers' conduct in assisting the medical personnel in this act would not, as a matter of law, amount to an unconstitutional use of force. *See Roy v. Inhabitants of City of Lewiston*, 42 F.3d 691, 695 (1st Cir. 1994) (whether substantive liability or qualified immunity is at issue, "a jury does not automatically get to second-guess these life and death decisions, even though the plaintiff has an expert and a plausible claim that the situation could better have been handled differently"). At best, this conduct would amount to negligence or medical malpractice which is insufficient to support a civil rights claim against the police officers. *See Wilson v. Meeks*, 52 F.3d 1547, 1556 (10th Cir. 1995) ("To pinion the police in the center of such a medical dispute is unfair and unwise").[10]

The Petition represents a groundless attempt to seek still further review of a decision petitioners simply dislike. No writ should be granted.

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9. The undisputed record established that the respondent police officers neither positioned the decedent on the reeves stretcher nor fastened the straps on the stretcher. Thus, there is simply no factual basis for this claim against the respondent police officers.

10. Following dismissal of petitioners' federal civil rights claims, petitioners brought suit against the respondent police officers and all the other defendants in state court alleging negligence and a host of other state law claims. That suit is currently pending.

CONCLUSION

For the foregoing reasons, respondents Michael Cooper, Robert Hochstuhl, Charles Priolo and Michael Behre request that the Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX A — TRANSCRIPT OF PROCEEDINGS DATED MAY 23, 1994

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

DOCKET NO. 2-91-cv-02140

Transcript of Proceedings

Monday, May 23, 1994
Newark, New Jersey

BARBARA LEE PERLMUTTER,

Plaintiff,

vs.

MICHAEL COOPER, et als,

Defendant.

CIVIL ACTION

BEFORE:

THE HONORABLE JOHN W. BISSELL, U.S.D.C.M.

APPEARANCES:

MARIA DELGAIZO NOTO, ESQ.,
Attorney for Plaintiff

Appendix A

SAIBER, SCHLESINGER, SATZ
& GOLDSTEIN, ESQS.,
Attorneys for Defendants Cooper, Hochstuhl,
Priolo and Behre
BY: JENNINE DISOMMA, ESQ.

GACCIONE, PAMACO & BECK, ESQS.,
Attorneys for Defendant, Township of
Bloomfield,
MICHAEL J. CASALE, ESQ.

HURLEY & VASIOS, ESQS.,
Attorneys for Defendant Davis
BY: JUDITH IBER, ESQ.

GEBHARDT & KEIFER, ESQS.,
Attorneys for Defendants Bloomfield
Emergency Squad, Menzel and Depczek
BY: DARREN GILLIATI, ESQ.

[2] THE COURT: Once again, appearances for the record, please.

MS. NOTO: Mary Noto, attorney on behalf of Dr. Barbara Lee Perlmutter. Seated next to me is my associate Amy Millman Kershner and Ms. Perlmutter.

MS. DISOMMA: Good morning. Jennine Disomma of Saiber, Schlesinger, Satz and Goldstein. We represent the individuals officers, Cooper, Hochstuhl, Priolo and Behre.

MR. CASALE: Good morning, your Honor, Michael R. Casale from the firm of Gaccione, Pamaco and Beck, also

assistant township attorney for the Township of Bloomfield, defendant in this matter.

MS. IBER: Judith Iber from the law firm of Hurley and Vasios for Davis.

MR. GILLIATI: Good morning, Darren Gilliati from the firm of Gebhardt and Kiefer for Bloomfield Emergency Squad and Mr. Depczek and Mr. Menzel.

THE COURT: All right, thank you. I realize as I recall the Mr. Gilliati your clients have already been dismissed from this case?

MR. GILLIATI: Yes, it is my [3] understanding there has been a motion for reconsideration which technically has not been cited so far as our understanding, that's why we monitor it. I have —

THE COURT: I wasn't certain that is the case. It is not before us today but I appreciate that clarification. As far as the motion of the defendant, Mountainside Intensive Care Unit and its employees, that motion is still under advisement by this court and I am not going to hear additional argument on that today either, although it may be that some of the arguments advanced here will be pertinent.

The movants today are essentially the Bloomfield police officers, correct?

MS. DISOMMA: That's correct, your Honor.

THE COURT: And I don't know whether the Township of Bloomfield as such has formally joined in this motion but it

would appear that their liability would be predicated essentially on the Amelda premier and if the court were required or determined that it would dismiss as to the Bloomfield police officers, it would appear there is little basis for continuing to hold [4] the municipality in.

I don't know, someone will take issue with that concept but, it is something that we can deal with as we go along. I will hear — Ms. Disomma, I will hear from you first. I will then hear from Ms. Noto. If there are other counsel that feel that there's — that they have something to add, then I will hear from you in the last instance.

Proceed, please.

MS. DISOMMA: Thank you, your Honor. Your Honor, the police officers have filed a summary judgment motion dismissing the entire —all of the claims brought against them, that would included both the civil rights claims and the negligence claims. First I will focus on the civil rights claims.

THE COURT: You are talking about negligence claims, those, of course, are asserted pursuant to the New Jersey Tort Claims Act, is that correct?

MS. DISOMMA: That's correct. First I will address the civil rights claims. The plaintiff, which is Dr. Perlmutter, has asserted civil rights claims on behalf of her daughter, Ann Perlmutter, the decedent.

[5] These civil rights claims essentially arise in two ways. The first thing is Dr. Perlmutter asserts that the police officers restraint of her daughter was a violation of her daughter's civil

rights. The second issue and the second claim raised by Dr. Perlmutter is the positioning of the decedent on the stretcher when she was being removed from the apartment where this incident occurred, also provides a basis for Dr. Perlmutter to recover on a civil rights claim.

First I will address the restraint issue. The issue here is whether or not the police officers restraint of the decedent was objectively reasonable under the circumstances that confronted them at the time of the incident.

It is not a situation where we now look back with 20/20 hindsight on what happened to determine whether or not their conduct was reasonable, the Supreme Court in *Graham* expressly stated that the standard is whether or not at the time, based on the circumstances that confronted them, it was objectively reasonable for them to restrain the decedent.

Let's look at the circumstances that confronted them at the time. They were called to [6] the apartment of one Mrs. Julia Sanowski, an elderly woman who resided with her even more elderly father who was apparently disabled and couldn't get out of bed.

THE COURT: I am familiar with the facts in this case, I don't think you have to belabor them, although I will certainly allow you to emphasis any particular aspect of them that you think is particularly important.

MS. DISOMMA: I will not waste your time then, I will go right to the heart of the matter. What confronted the police officers at the time that they entered the apartment was a young woman obviously under the influence of drugs who was

terrorizing the occupant of that apartment by running around the apartment in a crazed state, shutting off the lights, making — screaming incoherent noises. The decedent ends up in their bedroom where she begins to run about the room, violently moving her legs and arms, again screaming, yelling, out of — totally out of control.

THE COURT: She had arrived through the window initially?

MS. DISOMMA: That's correct, [7] she had crashed through the window of Mrs. Sanowski's apartment at 1 o'clock in the morning. The police officers arrive, they take a statement from Mrs. Sanowski, they observe the decedent in this condition.

The police offices state what they did to control the situation. What did they do, they got on their hands and knees next to the decedent and tried to talk to her, try to coerce her into coming down so they can assess her medical condition because the testimony is clear she had dry spats of blood about her body.

She was clearly under the influence of drugs, clearly needed to some kind of attention; whether that be some kind of medical attention, either psychological or physical.

Initially she responds to their coaxing and she sits up and she's quiet and they are talking to her and they are talking to her and all of a sudden, unprovoked, she lunges for a stand alone mirror in the room and attempts to bring the mirror down on her and them. At that point the violence escalates. She starts kicking, punching and this time the movements are directed to the police officers.

[8] The medical personnel arrive on the scene, that's the BVS, Bloomfield Volunteer Squad, as well as paramedics from Mountainside Hospital. They have all unequivocally testified that they could not do an assessment of the decedent because of her uncontrolled violent state. What choice did the cops have in this situation but to restrain the decedent to prevent her from further injuring herself, which she obviously demonstrated a propensity to do in light of the lunging at the mirror; two, to prevent her from injuring them or the occupants of that apartment and they have an obligation to those people also; and three, to provide the medical personnel with an opportunity to assess her medical condition which they could not do under the circumstances.

In fact one of the paramedics testified when anyone went near her she was trying to bite the hands, the hands of the people who went near her.

I submit that there can be no question under the circumstances it was objectively reasonable for the police officers to restrain the decedent by handcuffing her hands behind her back and securing her and ankles with a bed sheet. That is all they did.

[9] THE COURT: Am I correct that this cast of objective reasonableness is based on what confronted the officers at the time is virtually the same in determining what civil rights claim has been made out in the shall we say as would be applied in determining whether these officers enjoyed immunity versus *Harwood vs. Fibert?*

MS. DISOMMA: That is also correct and it's the same standard to determine whether or not they are entitled to

immunity under the state claims for the negligent actions. It is exactly the same standard objective reasonableness.

THE COURT: Thank you.

MS. DISOMMA: It is a matter of law to be decided by the court.

In response to this scenario, plaintiffs argue a couple of things. The first thing they argue is that the police officers acted inappropriately because this was a medical emergency. Your Honor, the plaintiffs paint this as if the police arrived and there was a hemorrhaging, unconscious, dying young woman that they handcuffed and threw her on the stretcher.

The facts do not support that [10] interpretation. The facts in this case are undisputed. Every single eyewitness to this incident, including Mrs. Sanowski's, the paramedics, everyone has all consistently testified how this woman acted when the police arrived at the apartment.

Yes, she had dry blood on her body. Everyone said the blood was not flowing at the time she arrived. She clearly was not having a seizure. There is absolutely no evidence to support that. Her eyes were open, she had good color, her movements were purposeful as opposed to involuntary.

Plaintiff is raising all of these red herrings to keep a civil rights case going that should not be here.

Oh, and by the way, plaintiff's own expert — plaintiff retained a procedures experts, a police procedures expert — their own expert does not opine that under these circumstances it was

inappropriate to restrain the decedent. He doesn't say that in his report. He doesn't say it was inappropriate to restrain the decedent or the manner of restraint was improper.

That is the best evidence of all, not only [11] is there no factual testimony, there isn't even expert testimony to support a claim here that the place officers' restraint of the decedent was a violation of her civil rights.

The second aspect of the plaintiff's claim, and I might add this is kind of a new thing that's been added to the case since these motions have been filed, is that the positioning of the plaintiff's decedent on the Reeves stretcher was improper and constitutes a violation of her civil rights.

Couple of comments on this claim. First of all, there is no question of fact or credibility with respect to the positioning of the decedent's face. Initially in the pleadings plaintiff claims that the police officer stated she was face down and her face was buried in the Reeves stretcher. Incorrect. Every single eyewitness to this case has testified that the decedent's head was to the side, her stomach was down.

The plaintiffs have also testified that the term face down in police jargon means stomach down. There is no positioning of a face down. You would never put anybody face down. Interestingly, plaintiff's expert in his clarification letter that [12] I received this week agrees. He says face down in police terminology means stomach down, face to the side. There is no question that this woman's face was not buried in the stretcher. That's point number one.

Point number two is this: everyone agrees in this case that once the medical personnel arrive at the scene they, and not the

police officers, are responsible for the care, medical care, rendered to the decedent. In this case there has been testimony that the medical personnel arrived just as the police officers were restraining the decedent. They will testify she should have been restrained so they can do their assessment.

At that point the BVS and the police officers were placing the decedent on the Reeves stretcher, BVS testified they couldn't do it themselves, even after this woman was restrained she continued to struggle, fight, bite the hands that came near her so the police officers have all testified, "Well, yes, I may have helped put her on the Reeves stretcher, I don't remember. Someone helped but we don't know who did."

Why don't they know? Because this was an emergency situation, they were all acting at the [13] moment trying to do what was best for this young woman. So she's placed on the stretcher. At most police officers assisted the BVS in placing in woman on the stretcher.

The testimony is undisputed that she was placed with her stomach down with free movement of her head at all times. All the witnesses have testified that as she was being lifted onto the stretcher and removed from the apartment she continued to move, scream, yell, bite, giving no indication whatsoever that she was having any kind of cardiac arrest. Even assuming that, placing someone on a stomach was not the most appropriate way, plaintiffs expert say well, she should have — may have been — may be placed on her side.

Your Honor, with all due respect that is not what makes a civil rights case. If anything, that is a negligence claim and I am not even admitting here that they were negligent in doing what

they did because under the circumstances they did what they could.

If plaintiff is trying to assert that these police officers and BVS had the obligation to hold her in place on her side while she's moving around biting them, I mean it is absolutely ludicrous. [14] Why did they put her on her stomach? Officer Priolo tells us why you don't put someone on the back. If they regurgitate, which is common in drug cases, they will choke on their regurgitation.

The point was these people were moving in an emergency situation. They wanted to get her out of the apartment. The apartment was cramped with a lot of furniture. They couldn't maneuver her there, they wanted to get her out, get her outside, do a medical assessment of her and get her to the hospital.

There is nothing here to support a civil rights claim. In a civil rights claim what is pertinent had to be maintained on these facts that would open the flood gates for every single time a police officer makes an arrest, takes someone into custody, assists a victim, that would open the flood gates for civil rights claims.

We need to differentiate between what is civil rights that is egregious behavior that shocks the conscious of the court under the 14th Amendment and negligence, which I believe is what the plaintiff is trying to assert here.

THE COURT: Please close with a few comments if you have anything to add concerning [15] the New Jersey Tort Claims laws. I have a long list and I want to move along.

MS. DISOMMA: The other thing I wanted to say the 1985 claim which I didn't address and I will do that very briefly, there

is no 1985 claim here for two reasons. First of all, plaintiff hasn't established a 1983 action which is a requirement. Second, plaintiff cannot establish that anything a police officer did was because of the decedent's race.

The police officers reasonably believe the decedent was white. The reason they believe that is because she looked white, the police report says she was white, the BVS report says she was white, all the police officers reports prior to this incident — Ann Perlmutter is known to the police department, she had a lot of prior incidences regarding the drug overdose and braking into people houses, every report says she is white.

The best evidence is all of the treatment Ann Perlmutter received. In every one of those records it says she is white, which means one two things; either Ann Perlmutter represented to the world she is white or these people taking the intake believe she was white from looking at her. [16] There is no evidence here to say that this woman was black or they treated her differently because of her race.

With respect to the state claims, your Honor, the Tort Claims Act provides immunity from the officers under these circumstances. The Supreme Court has directed when analyzing cases under the Tort Claim Act first you look to see if there's an immunity that covers an officer before you look to the negligence. Here, *N.J.S.A.* 49:3-3 clearly gives these police officers immunity for the good faith execution of their duties.

The standard under the Tort Claims Act is exactly the same as it is under *Harlow* for determining whether or not the officers are entitled to qualified immunity for their civil rights for the civil rights claims and because of that they are entitled for immunity for the state claims.

THE COURT: Thank you.

Ms. Noto, anything to add? I have heard your cross in the past, particularly regarding the underlying facts here, but anything you would like to emphasis particularly as it entertain the police officers, I would be happy to hear you.

[17] MS. NOTO: Thank you, your Honor. Judge, just for the record, I would note that I object to any comments by counsel for the defendants who are not a part of this motion. This motion, of course, was brought only by the defendant police officers and not by any other defendant.

As I sat here today and listened to counsel for the police officers' oral argument it became even more clear to me, I think, that what counsel is basically asking the court to do is accept as fact what her clients say and not go any further than that.

Additionally, it seemed to me that some expert opinions were being offered to this court absent an expert report, and of course with the fact that of course counsel is not an expert and is not qualified to offer any expert opinions as to the cause of death.

I think one of the things that is important that this court remember is that there are basically two expert opinions in this case as to the cause of death. Defendants have not provided the court, nor us, with an expert's report.

So what we are dealing with from a medical [18] viewpoint is the opinion of two doctors. One of them is the doctor who did the autopsy, and his report is part of our appendix. I believe his name is Dr. Senha. And what Dr. Senha says is that the decedent died an accidental death of blunt trauma force to the head. So that's one

opinion. The other expert opinion offered to this court is that of Dr. Durky, our medical expert, and it is Dr. Durky's opinion that as indicated in his report that we provided the court with, that what the decedent ultimately died of or the cause of her death was hypoxia, which is, of course, lack of oxygen.

But whether you accept, and of course it is not this court's province to really make a factual determination as to what opinion you are going to accept, but whether you accept the pathologist opinion or whether you accept Dr. Durky's opinion, the decedent did not die of a drug overdose.

The counsel for defendant police officers stresses over and over that the decedent had a drug problem. However — and I can only call it insinuations because there are no facts to support it, her insinuations that really what killed the decedent was drugs is absolutely completely [19] unsupported by the record and unsupported by any expert testimony.

In fact, one of the things that Dr. Durky notes in his report was that the decedent, while her urine was positive for cocaine, her blood at the time of her admission into the hospital was negative for cocaine. According to Dr. Durky that would indicate only past ingestion and would not indicate that the decedent, during a recent time span, consumed cocaine.

THE COURT: It seems to me that may not be particularly critical here other than in terms of verifying at least to some extent the nature of her actions within this apartment. And frankly, whether they are cocaine induced, or alcohol induced, there doesn't seem to be anything of that here, or inherent dementia or personality disorder that nobody seems to know anything about it frankly is not that material as far as I can see it.

Appendix A

The question is what type of conduct were the police required to react to and did they react in an objectively reasonable fashion given the circumstances and the moment with which they were faced.

[20] MS. NOTO: Judge, the —

THE COURT: I am not going to assume at all that the cause of her death had anything to do with drug ingestion and I don't think I'm being asked to do so.

MS. NOTO: I brought that before the court because it was brought up by counsel for the defendant police officers and I think that the gist of what the defendant police officers are arguing is that because, and I think it says that in their brief, that she was in a drug crazed state and, therefore, acting in this violent manner. However, what I would like the court to take notice of is the facts that were argued by counsel for the defendant police officers are really just one side of the story and are not undisputed facts.

THE COURT: That's the other point I would like to discuss with you, and we've had to deal with this before in connection with other motions, what description of the events transpiring in the apartment, on the stretcher, out to the ambulance and even within the ambulance, what description from any eyewitness is still to come? Presumably we've got them all, haven't we, in terms of all depositions or affidavits from all [21] of the surviving eyewitnesses to the event, is that correct?

MS. NOTO: Yes, your Honor.

THE COURT: Is there anything within the description of those facts from any witness which would demonstrate to the

court that these police officers did not act in an objectively reasonable fashion given the circumstances with which they were confronted? You say for instance that is only one side of the story. Where is and what is the other side of the story if it can be told here?

MS. NOTO: I think if we are looking at whether it was reasonable you have to look at all the facts that have come forth in discovery and the facts that have come forth in discovery through the depositions and through the police reports have indicated that there were at least four police officers there in addition to other medical personnel, despite the fact that the medical technicians, Davis and McNiff, say that the decedent was cursing and acting in a violent manner, I think it is important for the Court to know that in all of the depositions of the police officers, every police officer agreed that the [22] decedent in fact was not coherent, was not able speak, that the sounds coming from her were guttural sounds.

These are sounds that are consistent with seizure and in fact the police officers did agree to that. Additionally, all of the police officers agree that the person they were dealing with, who they called patient, they did not say that this was like in *Graham* — one of the cases cited by defendant police officers is *Graham vs. Connor* and they site that case in support of their objectively reasonable argument.

However, I looked at that case and I thought that that case supported opposition, but let me get back to that because I know I am not answering your question if I go off on that legal tangent.

But the depositions establish that this was a small woman, that when the police got there she was lying on the floor in the

bedroom. The deposition establish that she had been there for several minutes. Mrs. Sanowski, the woman whose apartment she had come crashing through, and I think you need to remember respectfully that we do not know how exactly she came crashing through the apartment, however there was testimony from the [23] police officers that they became aware that she had a relationship with a man on the third floor and they questioned this man after the incident and in the course of going up to the third floor and questioning him they also examined the hallways and found blood in the hallways and a shattered glass on the third floor and they did some kind of a cursory investigation but never really pursued it.

And I point that out to the court only to bring to the court's attention to the conclusion that this was some kind of a crazed, violent individual that was running around causing damage is only one conclusion that can be drawn from the facts that are presented and certainly another conclusion based on the fact that there was blood on the third floor, that she had been living with this person who had been — who had provided her —this much older man who had provided her in the past with drugs and who had assaulted her. Police had been called there. This person had assaulted her in the past.

Certainly the fact that she came crashing through the window could also be a conclusion resulting from the fact that she had been beat once again by this man because of the trauma to her, she [24] was incoherent, she was dazed and either he was chasing her or in an effort to escape from him she went through that window.

Every police officer who was there, all of the medical personnel that were there, all of the ambulance people that were there agree that this little girl, because that's basically what she

was, she was basically about five foot two and 105 pounds, did not hurt anyone. Everyone agrees that she did not touch anyone.

So the argument that the police were really trying to control this crazed, violent individual only comes from counsel. It does not come from discovery, it does not come from the police report. In fact, what the police say in their deposition is that they were trying to protect this woman from herself and certainly whether or not that's credible has to be looked at in terms of what they did in trying to protect her because ultimately we know from our expert that what they did in trying to protect her was to kill her and even if you don't accept that at this point but in looking at the credibility and I don't even think at this point you should be making a credibility determination.

[25] THE COURT: Absolutely not. I am not being asked to do so and I can't. It would be an irreversible error in a summary judgment context, no doubt about it.

MS. NOTO: Absolutely, your Honor. In looking at the reasonableness that the police contend they did to protect this five foot two, 105 pound individual from hurting herself you have to look at what they did. Was it objectively reasonable for the police to take this person's hands, cuff them behind her back, take a sheet, roll it several times around her ankles, tie her ankles together, take this young girl, lay her prone, whether it is face down or face to the side, everyone agrees that they put her — they put her stomach down, torso down —

THE COURT: Stomach down.

MS. NOTO: — on a Reeves stretcher which we found out from depositions is a soft leather kind of stretcher, strapped her three times to that stretcher then took that stretcher and again

placed her stomach down on top of another cot, put blankets on her and strapped her with additional straps to that other cot.

It is Dr. Durky's opinion that whether her [26] face was down or to the side the restraint on her diaphragm, having her hands cuffed behind her back and then strapped down, face down, torso down, interfered with her breathing and in looking at the objective reasonableness of this, I think you have to accept, Dr. Durky's report.

You have to accept Mr. Debroski's police practices and procedures report because there are no — there is no report that contradicts that from the defendant police officers and I would submit that there is no report that says that was proper because it wasn't proper.

So in looking at the objective reasonableness I think you also have to look at the fact that these police officers in their depositions and in their reports did not characterize this person as a suspect, they did not say they were arresting her. Obviously they seized her. There was no place she was going. Her movements were restrained. They themselves also called her a patient.

THE COURT: Ms. Noto, would you bring your remarks to a close, please?

MS. NOTO: Judge, I really have nothing further to add unless there is something [27] that you want me to address.

THE COURT: No, I don't think so.

Ms. Disomma, I agree, I don't think it is necessary for me to a hear from other counsel. This is your motion and you certainly argued it adequately. I just have one question for you.

Appendix A

Let us assume that I were to agree with you in terms of your analysis of the events that transpired here, and frankly I'm inclined to do so we don't — nobody can be asked to sit essentially and exercise the type of 20/20 hindsight that perhaps is being argued here, and of course summary judgment is available in these context, that's what *Howell vs. Fitzgerald* tells us. But what if we are faced from the other side with expert reports that say all right, Ms. Perlmutter didn't survive, the other participants in this thing have all described these facts in ways which they believe demonstrate justification of their actions and we are prepared to accept that there is no choice that is what they are going to testify to.

Nevertheless, when experts believe this action was inappropriate for the following reasons, A, B, C, D, and what have you, does the presence of [28] those experts reports themselves generate the type of situation as a matter of fact or law that allow this case to survive for trial?

MS. DISOMMA: I believe it does not, your Honor, and I will tell you why. Let me say this, the plaintiff's expert reports do not say anywhere that what the police officers did here was inappropriate or not reasonable under the circumstances. Nowhere, and I challenge plaintiff's counsel to pull out Mr. Debroski's report to show it to the court, Mr. Debroski's report does not say it was inappropriate to restrain the decedent or the manner of restraint was inappropriate.

I have an expert report that was says it was appropriate. This is isn't a battle of expert reports, this is undisputed facts. Why do I need an expert if her expert supports my position?

THE COURT: Essentially what you're saying is arguably at least is if you introduce your expert's report it might generate the

type of issue that you wish to avoid, therefor you are not presenting it?

MS. DISOMMA: Not in this case because my expert and her expert say the same [29] thing. My expert says what her expert says by omission. Her expert does not say it was inappropriate or improper for the police officers to restrain the decedent under these circumstances. One would anticipate that if one goes out and spends thousands of dollars to pay an expert to come in and testify and the expert does not say the restraint was inappropriate that is that he is not going to say it was inappropriate.

THE COURT: I suppose also even if the reports were to say that it was inappropriate or demonstration of negligence or not the best choice or what have you, that doesn't mean that the events rise to the level of either a 1983 or 1985 or a New Jersey Tort Claims Act case, correct?

MS. DISOMMA: That is exactly my next point. For reasons of immunity you mention —that is my point. Even if he said it was inappropriate when your Honor looks at the facts that confronted these officers when they entered that apartment, it is objectively reasonable what they did. Plaintiff's counsel doesn't offer any other explanation as to what they should have done. What should they have done, left this woman there [30] flailing about Mrs. Sanowski's apartment? What other choice did they have here?

THE COURT: Thank you.

MS. DISOMMA: With respect to the medical —

Appendix A

MS. NOTO: Could I briefly respond to that? What they should have done is not retrained her in such a manner that she couldn't breath. They very well could have restrained her hands in front of her chest if they felt that was necessary. These were four big police officers. They certainly could have tried other means to restrain her in a way that she could continue to breath.

Additionally, it should be noted that the depositions of the police officers do not indicate that anyone even gave a key to unhook the handcuffs of the hands of the decedent to the ambulance personnel when they left with her. That obviously protecting — that is one factor that a jury could consider in determining whether or not they really — the police officers were really concerned for the protection of the decedent. If they were so concerned for her protection, they wanted her to live so much, then why didn't they at least provide [31] the handcuff keys to the ambulance personnel after she was taken away?

Additionally, with regard to the Tort Claims Act, I think it is important to note that that act says that police officers in the absence of good faith, which I agree is objective reasonableness, can be held liable for wrongs and injuries which occur during the course of their employment.

So I think it is not just a negative act, it is also a positive act, it is an act that gives people the right to bring lawsuits absent one of the exceptions.

Additionally, it is absolutely untrue that our expert does not say that the restraints imposed by the police were improper. He absolutely says that they were improper and we appended them to our appendix. He says that the police acted inappropriately in handling the situation. "They were grossly negligent. They acted

with reckless disregard for the welfare of Ms. Perlmutter by placing her in a prone position on the stretcher and failing to provide for the protection of the airway." But he goes even further and in his additional report he explains that whether or not she was prone is not the be all, whether or not she [32] was face down, whether her face was in the stretcher is not the be all and end all of his opinion.

He emphasizes, and I think you have to keep this in mind that you are not dealing with a situation where an armed robber is running away from the police and they have the right to shoot him even if that results in his death. You have a situation where you are talking about somebody who has been hurt before the police even get there. It is not true, and I beg the court to review the depositions if the court has not done so, it is simply not true that the decedent was not bleeding to the point where it would be noticed.

All of the police officers testified that they saw blood on the victim. All of the police officers testified that they saw blood on her head, that they saw blood on her hands, they saw blood on her legs. All of the police officers testified that she was incoherent. Under the objective reasonableness standards, under *Graham vs. Connor which is cited over and over by the defendants* this is a case that has to go to a jury.

It would — Judge, I would just like to site a portion of *Graham vs. Connor* to the court. As [33] the court noted, "Because the effect of reasonableness on the Fourth Amendment is not capable of precise definition, its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue."

Appendix A

Most of the cases, all of them, I think cited by the defendant police officers involve a situation where a criminal, usually a violent criminal, is running away. So, the severity of the crime at issue is one of the considerations that according that the United States Supreme Court in *Graham vs. Connor* set forth as proper for this court to consider in determining objective reasonableness.

So you look at the severity of the crime at issue in this case and you have to go to the depositions of the police officers. I'm saying go beyond the police report which lists decedent as a victim but go to the depositions of the police officers. They all agree that she was not under arrest, she was not going to be charged and this was not done for purposes of preventing a felon on from fleeing.

THE COURT: I certainly agree [34] with that and I don't think the other side disputes that either.

MS. NOTO: Then the next criteria that the United States Supreme Court sets forth in *Graham* for this court to consider in determining objective reasonableness is whether the suspect poses an immediate threat to the safety of the officers or others. So, in considering that does she pose an immediate threat, I think you have to look at what had gone on prior to the police tying her together, handcuffing her behind her back and helping to strap her down face down on a stretcher.

No one had been hurt. She had no shoes on. That's clear. She's a little girl she's not a heavy girl, she has no shoes on, she's bleeding from her head, her hands and her feet. The police officers all agree she did not hurt them, she did not touch them in any way whatsoever.

Appendix A

According to the deposition testimony, both theirs and Mrs. Sanowski's, there was a free standing mirror, the police officers thought that she made a motion toward the mirror and it is based on the fact that they are saying, and this I submit is a factual issue, an issue as to whether she even [35] made that motion to the mirror, but again you come back to was it reasonable.

Based on her — according to the police officers — making a motion to the mirror and maybe she might have brought the mirror down on herself because that is what they say in the deposition testimony. Not what Ms. Disomma says. That's what they say in the deposition testimony.

So then what this court has to consider is was the fact that she might have somehow brought the mirror down sufficient cause to make it reasonable, objectively reasonable, for the police to then take this very, very critically injured young girl, tie her up, put her face down, strap her down and whether her face was in the middle of the stretcher or not, one of those straps goes right across the neck, so whether her face was to the side or not, was it reasonable for the police to then not only restrain her but tied her, handcuff her behind the back, not give the key to the ambulance personnel and treat her in that manner because they were stopping her from hurting herself and their help resulting in her death.

THE COURT: Thank you.

Just a moment. We're done. This court has [36] absolutely no criticism of the self-advocates before me. This has been a zealous argument. There are important considerations that run in connection with both sides of this matter.

Police brutality if it exists is not to be countenanced and it is among the reasons that section 1983 is available for the address of

bona fide claims. Equally important, however, at least as a matter of public policy is the fact that the police have to react in an infinite variety of circumstances on the spot, using whatever their best judgment may be at the time.

It is in a recognition in part of those competing interests that the standards involved by this type of conduct is measured essentially a standard of objective reasonableness viewed by — from the point in time and the circumstances in question as best one can do so.

The court is very mindful that it may not usurp the function of a jury in connection with the findings of facts. On the other hand, summary judgments in matters such as this kind have been endorsed by the United States Supreme Court in *Howell vs. Fitzgerald* in rating the objective reasonableness standard in that case and in the [37] context of immunity available to governmental officials.

Therefore, in making this decision certainly in its own perception, and I will have a little bit more to say about this in writing, is not upsurging the jury function, is not upsurging the duty for what the jury might determine.

I have reviewed the depositions and the other presentations of fact regarding this case. It is true that Ms. Perlmutter is not her to speak for herself. That's the reason we are all her in court. Whether she would have a different version of the facts we will never know and surely that in itself cannot be used as a source for the genesis of supposedly genuine issue for material facts. No one would suggest that.

It is this court's view that there are no genuine issues of materials fact and when measured objectively under the

standards of reasonableness that we talked about today, the conduct of the police officers is not actionable, it is not actionable under Section 1983, it is not actionable under the New Jersey Tort Claims Act.

It is this court's view as well, therefore, that without any basis in liability on behalf of [38] the police officers that the matter must be dismissed as to the municipal defendants as well. I suppose the theoretical argument could be made that the municipal defendants were lax in terms of any training or manuals or whatever, what have you, in sort of reliability that is often imposed under the manual doctrine, whereas here the court has determined that there is no actionable conduct by the police officers anyway then there could be no cause or nexus between any lack of training.

I realize that the Bloomfield defendants or the municipal defendants as such did not formally join in this motion and although it is supported, I think there was a letter indicated they supported it, nevertheless I do believe that the plaintiff, not only on the motion of these defendants, but also in the motions that have preceded it, certainly was on ample notice and had ample opportunity to present to this court whatever circumstances might hold admissible defendants as well as their agents or police officers.

So the court feels that it is impowered to entered summary judgment on behalf of the Township of Bloomfield, et al, without requiring a formality of a separate motion from that defendant.

[39] I have under advisement as well as you know here the prior motion brought on behalf of the Mountainside Hospital M.I.C.U. I would be issuing a written opinion in connection with

the motions before me today, that will be accompanied by an opinion as well granting the motion of those defendants.

What happened here was a tragedy, but there are occasions and probably not infrequent when the happening of the tragedy doesn't necessarily cast liability upon those who are on the scene and taking some action in connection therewith. This is one of those cases.

The opinions will be more elaborate. Thank you .

MS. NOTO: Judge, will your Order be signed today or will it be signed at the time —

THE COURT: The Order will be signed at the time the opinions are issued for purposes of the commencing of any time for appeal and I will try to get them out as quickly as I can. I want to be thorough.

MS. DISOMMA: Thank you.

(Proceedings concluded.)

* * *

Appendix A

[41] CERTIFICATE

I, KATHRYN BRIGGS-KRAUSE, a Certified shorthand Reporter and Notary Public of the State . New Jersey, certify that the foregoing is a true and accurate transcript of the proceedings, on the date and place hereinbefore set forth.

s/ Kathryn Briggs-Krause,
KATHRYN BRIGGS-KRAUSE, C.S.R.
LICENSE NO. XI01276.

Supreme Court, U.S.
FILED
DEC 12 1995
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No. 95-579

In The

Supreme Court of the United States

October Term, 1995

DR. BARBARA LEE PERLMUTTER, et al.,

Petitioners,

v.

MICHAEL COOPER, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

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12 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

FEDERAL RULE INVOLVED 1

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 4

POINT I – TO THE EXTENT PETITIONER INTENDS TO SEEK CERTIORARI AS TO ANY CLAIMS CONCERNING THE BVES DEFENDANTS, THEY ARE NOT PROPERLY BEFORE THIS COURT 4

POINT II – THE BLOOMFIELD VOLUNTEER EMERGENCY SQUAD IS NOT A STATE ACTOR FOR THE PURPOSE OF 42 U.S.C. §1983 6

A. AS A VOLUNTEER AMBULANCE SQUAD, BVES WAS NOT A STATE ACTOR EVEN THOUGH IT RECEIVED SOME SUPPORT FROM THE MUNICIPALITY 6

B. BVES' COOPERATION WITH THE BLOOMFIELD POLICE DID NOT MAKE IT A STATE ACTOR 8

TABLE OF AUTHORITIES

Page

Federal Cases

Blum v. Yeretsky, 457 U.S. 179 (1982) 7

Civil Rights Cases, 109 U.S. 18 (1883) 6

Community Medical Center v. Emergency Medical Services, 712 F.2d 878 (3d Cir. 1983) 6, 7

Groman v. Township of Manalapan, 47 F.3d 628 (3d Cir. 1995) (although financially assisted by the municipality, first aid squad was not a state actor) 7

Krieger v. Bethesda-Chevy Chase Rescue Squad, 599 F. Supp. 770 (E.D. Va. 1983) 8

Luger v. Edmonston Oil, 457 U.S. 922 (1982) 6

McKinney v. West End Voluntary Ambulance Association, 821 F. Supp. 1013 (1992) 7

Rendell-Baker v. Kohn, 457 U.S. 830 (1982) 7

Federal Statute

42 U.S.C. §1983 ..... 1, 3, 6

FEDERAL RULE INVOLVED

In addition to the provisions cited in the Petition, the following Local Rule of the District of New Jersey is relevant:

> Rule 12I – *Motions for Reargument* – A motion for reargument shall be served and filed within 10 days after the entry of the order or judgment on the original motion by the Judge or Magistrate. There shall be served with the notice a brief setting forth concisely the matters or controlling decisions which counsel believes the Judge or Magistrate has overlooked. . . .

STATEMENT OF THE CASE

This Brief is filed on behalf of the Bloomfield Volunteer Emergency Squad and volunteer Squad members Fred Menzel and Andrew Depczek (hereinafter the "BVES defendants"). The procedural history of the claims against these defendants is recited here because it demonstrates that they are not properly before this Court and that the claims against them have been treated with ambivalence by Petitioner throughout this litigation.

Summary Judgment was granted as to the BVES defendants by the Honorable John W. Bissell, J.U.S.D.C. on November 18, 1993, upon a finding that BVES was not sufficiently connected to the Township of Bloomfield to be a state actor for purposes of 42 U.S.C. §1983. (App. 12-15)[1]. Pendent state law claims against the BVES

[1] All citations to App. ___ are to Petitioner's Appendix.

defendants were dismissed without prejudice and are now pending before the Superior Court of New Jersey, Law Division. BVES is a private, not-for-profit corporation under New Jersey law which is controlled by its own board of trustees with a squad captain responsible for day to day operations.

All proceedings regarding these defendants subsequent to this initial grant of summary judgment stem from a single sentence in a brief filed on February 14, 1994, in opposition to co-defendants' subsequent motions for summary judgment. That sentence said simply: "[p]laintiff respectively requests that the Court reconsider its prior ruling granting summary judgment in favor of the BVES defendants." No proper motion for reconsideration was made and no additional reasons or arguments were provided as to why reconsideration was appropriate.

In its decision dated June 7, 1994 granting the Mountainside co-defendants' motion for summary judgment, the District Court found that this single sentence did not come close to complying with the applicable procedural and substantive requirements for a motion for reconsideration. (App. 50) Summary judgment was granted to all remaining defendants by this order and by another order bearing the same June 7 date. (App. 37-38; App. 52-54)

Petitioner then retained new counsel and filed a formal motion for reconsideration. This motion sought reconsideration of the entirety of both June 7 orders, apparently including the prior denial of reconsideration as to the BVES defendants, although plaintiff included no

argument as to those defendants and did not even address the issue of how reconsideration could be appropriate nearly a year after summary judgment had been granted. Petitioner's motion for reconsideration was denied by opinion and order dated August 23, 1994. (App. 55-65) This order is the subject of plaintiff's present Petition to this Court, having been affirmed by the Third Circuit (App. 1-3).

Notably, the District Court's order of August 23, which is the subject of the present Petition, did not purport to address any motion for reconsideration concerning the BVES defendants. (App. 52-54) Nevertheless, Petitioner did include these defendants in her brief before the Third Circuit, arguing that they had acted in concert with the police so as to be state actors under 42 U.S.C. §1983. This argument was apparently rejected by the Third Circuit on either substantive or procedural grounds, because that Court affirmed the District Court's decision for substantially the reasons set forth in Judge Bissell's opinion. (App. 1-3) Now, before this Court, Petitioner has again omitted any argument as to the BVES defendants.

REASONS FOR DENYING THE WRIT

POINT I

TO THE EXTENT PETITIONER INTENDS TO SEEK CERTIORARI AS TO ANY CLAIMS CONCERNING THE BVES DEFENDANTS, THEY ARE NOT PROPERLY BEFORE THIS COURT

Petitioner is seeking this Court's review of the Third Circuit's affirmance of the District Court's order of August 23, 1994, which denied reconsideration of two prior orders, both dated June 7, 1994. Initially, it should be noted that neither the District Court's August 23, 1994 Order nor the Petition filed with this Court address the issue of the BVES defendants. Thus, it is uncertain whether Petitioner even intends to seek this Court's review of any matters concerning those defendants. To the extent she does so intend, her request concerns an Order denying reconsideration of another order denying reconsideration and does not raise any issues which are appropriate for this Court's review.

The District Court's Order of August 23, 1994 denied reconsideration of two orders dated June 7, 1994. The opinion accompanying one of those two orders (App. 48-50), although not the order itself (App. 52-54), denied an obviously insufficient one-sentence motion for reconsideration of a November 18, 1993 Order granting summary judgment to the BVES defendants. (App. 16-18) Petitioner's papers in support of the August 23, 1994 motion did not even address BVES or the portion of the June 7th opinion denying reconsideration. Nevertheless, since she did not differentiate that she was seeking reconsideration of only parts of the June 7 decisions, the BVES

defendants were compelled to respond, although it was unclear as to whether any relief was, or could have been, sought against them. Thus, at most, the August 23 order now before this Court was, as to BVES, a denial of a motion for reconsideration of a prior denial of reconsideration.

These defendants were originally granted summary judgment by Order dated November 18, 1993. (App. 16-18) Since then, Petitioner has continued to include them in her various appeals and motions without argument or a statement of reasons. The only argument concerning the BVES defendants since they were initially granted summary judgment was in Petitioner's brief before the Third Circuit, where she argued that they had acted so closely with the police defendants that they should be considered state actors. The propriety of the failure to grant reconsideration of the November 18, 1993 opinion, the actual subject of the appeal as to these defendants, has never been addressed.

Now, on petition for writ of certiorari, Petitioner has simply ignored the BVES defendants altogether. They are not the subject of either of her Questions Presented For Review, both of which deal with standards for police liability. Similarly, no argument is made against them in Petitioner's Legal Argument and no wrongdoing on their part asserted in her Statement of the Case. For these reasons, if indeed Petitioner does intend to include the BVES defendants in her Petition, certiorari should be denied.

POINT II

THE BLOOMFIELD VOLUNTEER EMERGENCY SQUAD IS NOT A STATE ACTOR FOR THE PURPOSE OF 42 U.S.C. §1983

To the extent the Petition is interpreted encompass the summary judgment granted to the BVES defendants on November 18, 1993, or the failure to grant reconsideration of that decision on June 7, 1994 and August 23, 1994, certiorari should be denied, since the District Court correctly decided that BVES did not act "under color of state law" so as to subject it to liability under 42 U.S.C. §1983.

A. AS A VOLUNTEER AMBULANCE SQUAD, BVES WAS NOT A STATE ACTOR EVEN THOUGH IT RECEIVED SOME SUPPORT FROM THE MUNICIPALITY.

Although "state action" has been required for liability under §1983 since the time of the *Civil Rights Cases*, 109 U.S. 18 (1883), there is no single "test" for determining whether the conduct of a particular private individual may fairly be attributed to the state. *See, Luger v. Edmonston Oil*, 457 U.S. 922, 939 (1982). The determination is necessarily fact-bound and a number of different approaches have been developed to encompass the myriad forms of state involvement in private activity. *Id.; Community Medical Center v. Emergency Medical Services*, 712 F.2d 878 (3d Cir. 1983).

BVES is a private non-profit corporation organized under the laws of the State of New Jersey. (App. 13) Control is vested in a Board of Trustees and it is not subject to the management or control of the Township of

Bloomfield or its police department. (App. 13-14) Although some financial support is received from the municipality, all the members of BVES are volunteers and raise money to support its operations and the purchase of equipment.

BVES does lease space from the municipality and share dispatch services with the Police Department, but, as the District Court found, that is not a sufficient nexus to make the BVES defendants state actors. (App. 14-15) The receipt of state funding, even when coupled with substantial regulation, does not convert private action into state action. *E.g., Groman v. Township of Manalapan*, 47 F.3d 628 (3d Cir. 1995) (although financially assisted by the municipality, first aid squad was not a state actor); *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982) (private school receiving 90% of funds from state); *Blum v. Yeretsky*, 457 U.S. 179 (1982) (nursing homes caring for Medicaid patients).

Neither does BVES engage in functions which are "traditionally the exclusive prerogative of the state." *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982). The provision of emergency medical services has consistently been held, in the Third Circuit and in others, to fall outside the ambit of this "public function" test. *See, Community Medical Associates v. Emergency Medical Services*, 712 F.2d 878, 881-882 (3d Cir. 1983); *McKinney v. West End Voluntary Ambulance Assn.*, 821 F.Supp. 1013, 1019 (1992) and cases from other jurisdictions cited therein.

B. BVES' COOPERATION WITH THE BLOOMFIELD POLICE DID NOT MAKE IT A STATE ACTOR.

Petitioner argued before the Third Circuit that the "working relationship" between BVES and the Bloomfield Police Department revealed that these defendants were "acting in concert." In support of this conclusion, Petitioner cited to deposition testimony indicating only that no one single group was in charge of all aspects of this scene, but, instead, they used a "team approach" in which each group was responsible for its area of expertise. This is not in any way indicative of the type of conspiracy which would fairly attribute a private party's actions to the state for purposes in §1983, but rather involves nothing more than the ordinary level of cooperation necessary for several groups to effectively respond to a medical emergency. In this respect it is similar to *Krieger v. Bethesda-Chevy Chase Rescue Squad*, 599 F.Supp. 770, 773-774 (E.D. Va. 1983) in which the plaintiff asserted that the defendant rescue squad was a state actor because it assisted the fire department in the traditional public function of firefighting by providing emergency lighting and power. The court found that, obviously, not every level of support or assistance would bring a private actor within the traditional public function of firefighting, and noted that "[o]therwise, we might all be firemen."

Similarly, the BVES defendants did nothing more than cooperate with the police in a manner that would be expected in any type of emergency situation. This expected cooperation does not transform them, in effect, into policemen subject to liability as if they were a state actors. There is no evidence that the BVES volunteers

conspired or reached any meeting of the minds at the scene to deprive Ann Perlmutter of her civil rights. The members of BVES were under the control of their supervising officers on the Squad, and there is no evidence that they ever came under the control of the Township of Bloomfield or the Police Department. Each group worked in its area of expertise, none in charge of the other. The mere fact that they cooperated rather than interfered with each other does not render their actions part of a conspiracy.

CONCLUSION

For the foregoing reasons, the Petition of Dr. Barbara Lee Perlmutter for Writ of Certiorari should be denied.

Respectfully submitted,

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